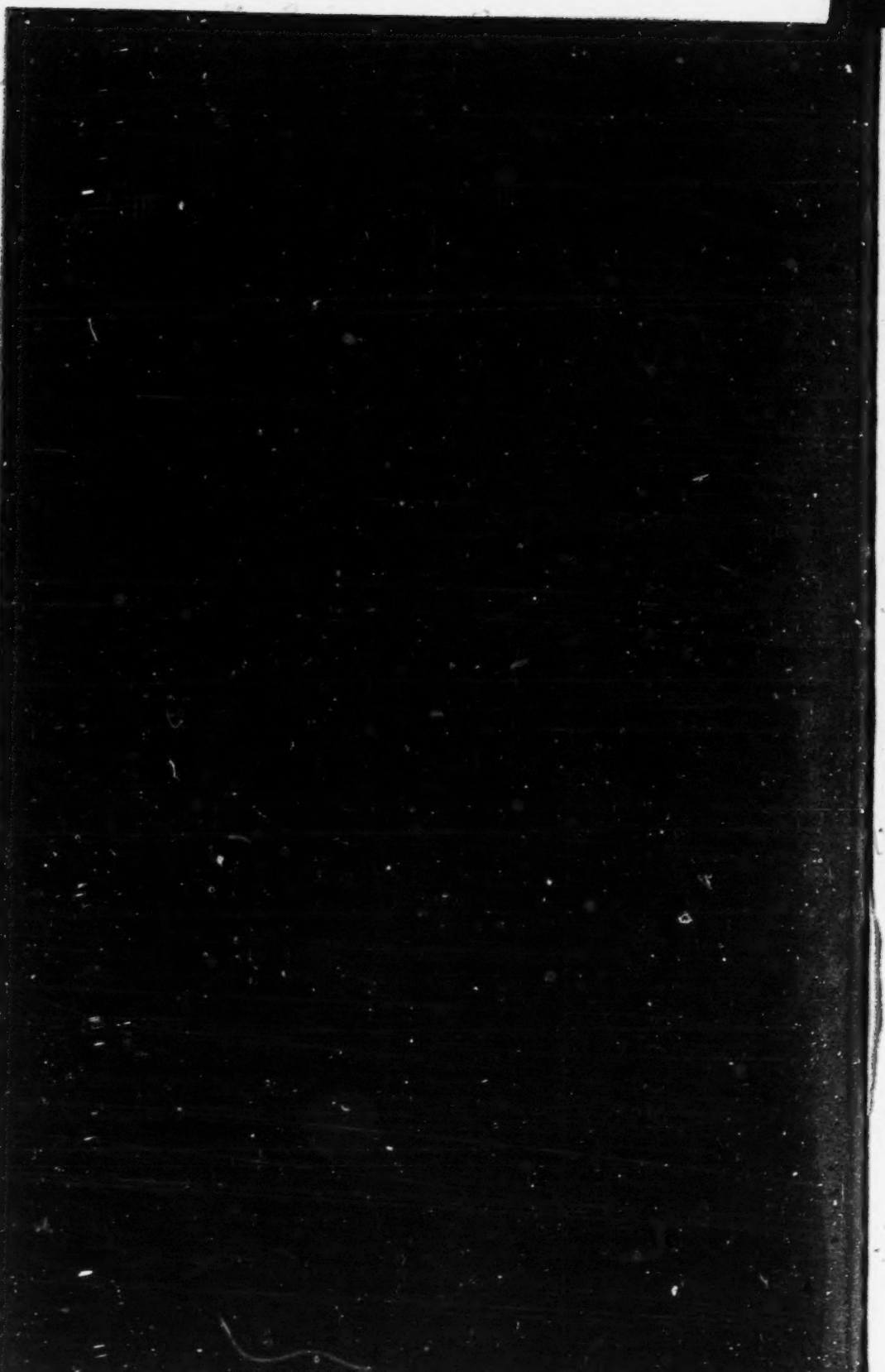

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 975

THE TENNESSEE ELECTRIC POWER COMPANY, A MARYLAND CORPORATION, ET AL.,

Appellants,

vs.

TENNESSEE VALLEY AUTHORITY, A BODY CORPORATE CREATED BY AN ACT OF CONGRESS APPROVED MAY 18, 1933; ARTHUR E. MORGAN, HARCOURT A. MORGAN, AND DAVID E. LILIENTHAL, EACH INDIVIDUALLY AND AS AN EXECUTIVE OFFICER AND DIRECTOR OF THE TENNESSEE VALLEY AUTHORITY,

Appellees.

SEPARATE STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States, appellants here submit their separate typewritten statement disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the decree of the United States District Court for the Eastern District of Tennessee, Northern Division, in the above entitled cause.

I.

The instant suit was originally filed in the Chancery Court at Knoxville, Tennessee, and was removed by the defendants therein to the United States District Court for the Eastern District of Tennessee, Northern Division. The complainants are eighteen corporations each of which was and is engaged in the generation, transmission or sale of electric energy as a public utility and operating in one or more of the States of Tennessee, Georgia, Alabama, Mississippi, Kentucky, North Carolina or Virginia, and entirely or partly in an area within which electrical energy might be practically transmitted from one or more of the dams now constructed, under construction or proposed to be constructed on the Tennessee River or its tributaries by Tennessee Valley Authority.

The defendants are Tennessee Valley Authority, a corporation created by Act of the Congress of the United States, and the three individuals who have comprised at all times since its organization and now do comprise the Board of Directors of said Authority, each of whom is named as defendant as an individual and as a director of said Authority.

Complainants, in said bill, seek an order or decree enjoining the further execution of the Tennessee Valley Authority Act of May 18, 1933, as amended August 31, 1935, and enjoining acts being performed and threatened to be performed by said Authority and the individual directors thereof in the execution of said statute upon the ground that neither said statute nor any of the acts being done or threatened to be done by the Authority and the individual Directors is authorized by any provision of the Constitution of the United States and they are severally in violation of Article I, Section 1, Article II, Sections 1 and 8, and in violation of the Fifth, Ninth and Tenth Amendments thereof, (a)

in that the said statute attempts to authorize and the defendants are engaged in constructing and threatening to complete the construction of a large system of dams and reservoirs for the purpose of generating hydro-electric power on the Tennessee River and its tributaries; (b) in that the said statute purports to authorize and the defendants are engaged in constructing heavy duty transmission lines to interconnect such hydro-electric generating plants so as to create a power pool from which, at any point, electric power can be drawn without reference to the point of generation and so as to create an integrated power generating system; (c) in that the said statute purports to authorize and the defendants are engaged in constructing and threatening to carry to completion a duplicating system of high tension transmission lines, substations, distribution lines and other facilities for the transmission, distribution and sale of electricity as a public utility throughout the State of Tennessee and large parts of the States of Alabama, Georgia, Mississippi, Kentucky, North Carolina, Virginia and West Virginia, in which complainants are now and have been operating as electric utilities, pursuant to the laws and the regulations of Public Authorities of the respective States in which each of complainants' properties and businesses are located; (d) in that the statute purports to authorize and the Authority and the defendant directors are engaged in creating and threatening to complete a huge Federally-owned and operated electric utility, which will compete with, if it will not destroy, each of the complainants in their respective service areas in the states aforesaid; (e) in that the statute purports to authorize and the said Authority and individual directors are engaged in the promotion of ownership and operation of local electric intrastate utilities by municipalities and non-profit organizations as agents of the Tennessee Valley Authority to distribute

power sold by it; (f) in that the statute purports to authorize and the Tennessee Valley Authority and individual directors are engaged in effecting a Federal regulation of the local electric rates of said municipalities, non-profit organizations and existing electric utilities, including the complainants, in the area in which said Authority and said directors are operating and threatening to operate said Federally-owned electric utility; and (g) in that the defendants, as a means of furthering the aforesaid objects and of taking over the operation and control of the electric power business in the territory now served by the several complainant companies, have promulgated and prescribed electric rates which are non-compensatory, confiscatory and discriminatory, have acted in concert with PWA, REA and other Federal agencies in assisting and inciting municipalities and non-profit organizations, through loans and gifts of Federal funds and by a campaign of propaganda against privately owned utilities to acquire local distribution systems to distribute TVA power, and have aggressively advertised and promoted the sale of TVA power among the customers of the complainant companies; and that the present and threatened future execution of said statute by said Authority and the present and threatened acts of said individual directors threaten irreparable injury, if not destruction, of the properties and businesses of each of the complainants, are unauthorized by any provision of the Constitution of the United States, invade the powers reserved to the States and the people and have and will further deprive each of complainants of their property without due process of law, all in violation of the Constitution of the United States, as aforesaid.

Pursuant to an act of the Congress of the United States, passed August 24, 1937, to wit, 28 U. S. C. § 380a, the presiding judge of the United States Circuit Court of Appeals for

the Sixth Circuit designated the Honorable Florence E. Allen, United States Circuit Judge, the Honorable John J. Gore, United States District Judge and the Honorable John D. Martin, United States District Judge to hear and determine said cause, and said United States District Court, so constituted as a statutory or three judge court heard the evidence and arguments and entered its decree denying the prayers of the complainants' Bill of Complaint and dismissing the same at complainants' cost.

II.

By express provisions of said Section 380a of Title 28, United States Code, jurisdiction is conferred upon this Court to review, by direct appeal, the judgments, including the judgment in the instant case of such specially constituted district court.

III.

The statute of the Congress of the United States, the validity of which is involved, is the Tennessee Valley Authority Act approved May 18, 1933 (48 Statutes 58-72), as amended August 31, 1935 (49 Statutes 1075-1081), and is hereto appended verbatim as appendix A.

IV.

The judgment complained of and sought to be reviewed was entered January 25, 1938, and a petition for the allowance of an appeal therefrom was presented February 24, 1938.

V.

The opinion of the specially constituted United States District Court, filed January 21, 1938, is hereto attached, marked "Appendix B" and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit denying com-

plainants an interlocutory injunction in said cause filed the 14th day of May, 1937, is hereto attached and marked "Appendix C."

Respectfully submitted,

CHARLES C. TRABUE,
CHARLES M. SEYMOUR,
RAYMOND T. JACKSON,
Solicitors for Petitioners.

TRABUE, HUME & ARMISTEAD,
FRANTZ, MCCONNELL & SEYMOUR,
BAKER, HOSTETLER, SIDLO & PATTERSON,
Of Counsel for Petitioners.

Dated February 24, 1938.

APPENDIX "A".

[PUBLIC—No. 17—73D CONGRESS.]

[H. R. 5081.]

AN ACT.

To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may be cited as the "Tennessee Valley Authority Act of 1933."

SEC. 2. (a) The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.

(b) The terms of office of the members first taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Vacancies in the board so long as there shall be two members in office shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Each of the members of the board shall be a citizen of the United States, and shall receive a salary at the rate of $10,000 a year, to be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the performance of the duties vested in the board by this Act. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall

any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) The board shall direct the exercise of all the powers of the Corporation.

(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act.

SEC. 3. The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents, as are necessary for the transaction of its business, fix their compensation, define their duties, require bonds of such of them as the board may designate, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

All contracts to which the Corporation is a party and which require the employment of laborers and mechanics in the construction, alteration, maintenance, or repair of buildings, dams, locks, or other projects shall contain a provision that not less than the prevailing rate of wages for work of a similar nature prevailing in the vicinity shall be paid to such laborers or mechanics.

In the event any dispute arises as to what are the prevailing rates of wages, the question shall be referred to the Secretary of Labor for determination, and his decision shall be final. In the determination of such prevailing rate or rates, due regard shall be given to those rates which have been secured through collective agreement by representatives of employers and employees.

Where such work as is described in the two preceding paragraphs is done directly by the Corporation the prevailing rate of wages shall be paid in the same manner as though such work had been let by contract.

Insofar as applicable, the benefits of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved September 7, 1916, as amended, shall extend to persons given employment under the provisions of this Act.

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safe-keeping of the securities and moneys of the said Corporation as the board may require: *Provided*, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be en-

trusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings.

(j) Shall have power to construct dams, reservoirs, power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines.

SEC. 5. The board is hereby authorized—

(a) To contract with commercial producers for the production of such fertilizers or fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. Such contracts may provide either for outright purchase of materials by the board or only for the payment of carrying charges on special materials manufactured at the board's request for its program.

(b) To arrange with farmers and farm organizations for large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce.

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction.

(d) The board in order to improve and cheapen the production of fertilizer is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the employment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

(e) Under the authority of this Act the board may make donations or sales of the product of the plant or plants operated by it to be fairly and equitably distributed through the agency of county demonstration agents, agricultural colleges, or otherwise as the board may direct, for experimentation, education, and introduction of the use of such products in cooperation with practical farmers so as to obtain information as to the value, effect, and best methods of their use.

(f) The board is authorized to make alterations, modifications, or improvements in existing plants and facilities, and to construct new plants.

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from this obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

(h) To establish, maintain, and operate laboratories and experimental plants, and to undertake experiments for the purpose of enabling the Corporation to furnish nitrogen products for military purposes, and nitrogen and other fertilizer products for agricultural purposes in the most economical manner and at the highest standard of efficiency.

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any

independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the service of such officers, agents, and employees, and the President shall, if in his opinion, the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual that may be by the President directed to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board: *Provided*, That any invention or discovery made by virtue of and incidental to such service by an employee of the Government of the United States serving under this section, or by any employee of the Corporation, together with any patents which may be granted thereon, shall be the sole and exclusive property of the Corporation, which is hereby authorized to grant such licenses thereunder as shall be authorized by the board: *Provided further*, That the board may pay to such inventor such sum from the income from sale of licenses as it may deem proper.

(j) Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of War the Corporation shall allot and deliver without charge to the War Department so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

(m) No products of the Corporation shall be sold for use outside of the United States, its Territories and possessions, except to the United States Government for the use of its Army and Navy, or to its allies in case of war.

(n) The President is authorized, within twelve months after the passage of this Act, to lease to any responsible farm organization or to any corporation organized by it

nitrate plant numbered 2 and Waco Quarry, together with the railroad connecting said quarry with nitrate plant numbered 2, for a term not exceeding fifty years at a rental of not less than $1 per year, but such authority shall be subject to the express condition that the lessee shall use said property during the term of said lease exclusively for the manufacture of fertilizer and fertilizer ingredients to be used only in the manufacture of fertilizer by said lessee and sold for use as fertilizer. The said lessee shall covenant to keep said property in first-class condition, but the lessee shall be authorized to modernize said plant numbered 2 by the installation of such machinery as may be necessary, and is authorized to amortize the cost of said machinery and improvements over the term of said lease or any part thereof. Said lease shall also provide that the board shall sell to the lessee power for the operation of said plant at the same schedule of prices that it charges all other customers for power of the same class and quantity. Said lease shall also provide that, if the said lessee does not desire to buy power of the publicly owned plant, it shall have the right to purchase its power for the operation of said plant of the Alabama Power Company or any other publicly or privately owned corporation engaged in the generation and sale of electric power, and in such case the lease shall provide further that the said lessee shall have a free right of way to build a transmission line over Government property to said plant paying the actual expenses and damages, if any, incurred by the Corporation on account of such line. Said lease shall also provide that the said lessee shall covenant that during the term of said lease the said lessee shall not enter into any illegal monopoly, combination, or trust with any privately owned corporation engaged in the manufacture, production, and sale of fertilizer with the object or effect of increasing the price of fertilizer to the farmer.

SEC. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made

on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board.

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Numbered 2, located at Muscle Shoals, its power house, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

(b) The President of the United States is authorized to provide for the transfer to the Corporation of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated.

SEC. 8. (a) The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the northern judicial district of Alabama within the meaning of the laws of the United States relating to the venue of civil suits.

(b) The Corporation shall at all times maintain complete and accurate books of accounts.

(c) Each member of the board, before entering upon the duties of his office, shall subscribe to an oath (or affirmation) to support the Constitution of the United States and to faithfully and impartially perform the duties imposed upon him by this Act.

SEC. 9. (a) The board shall file with the President and with the Congress, in December of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries, and duties of those receiving compensation at the rate of more than $1,500 a year.

(b) The Comptroller General of the United States shall audit the transaction of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the board, one for public inspection at the principal office of the corporation, and the other to be retained by him for the uses of the Congress. The expenses for each such audit may be paid from moneys advanced therefor by the Corporation, or from any appropriation or appropriations for the General Accounting Office, and appropriations so used shall be reimbursed promptly by the Corporation as billed by the Comptroller General. All such audit expenses shall be charged to operating expenses of the Corporation. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties intrusted to the Corporation by law.

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members: *Provided*, That all contracts made with private companies or individuals for the sale of power, which power is to be resold for a profit, shall contain a provision authorizing the board to cancel said contract upon five years' notice in writing, if the board needs said power to supply the demands of States, counties, or municipalities. In order to promote and encourage the fullest possible use of electric light and power on farms within reasonable distance of any of its transmission lines the board in its discretion shall have power to construct transmission lines to farms and small villages that are not otherwise supplied with electricity at reasonable rates, and to make such rules and regulations governing such sale and distribution of such electric power as in its judgment may be just and equitable: *Provided further*, That the board is hereby authorized and directed to make studies, experiments, and determinations to promote the wider and better use of electric power for agricultural and domestic use, or for small or local industries, and it may cooperate with State governments, or their subdivisions or agencies, with educational or research institutions, and with cooperatives or other organizations, in the application of electric power to the fuller and better balanced development of the resources of the region.

SEC. 11. It is hereby declared to be the policy of the Government so far as practical to distribute and sell the surplus power generated at Muscle Shoals equitably among the States, counties, and municipalities within transmission dis-

tance. This policy is further declared to be that the projects herein provided for shall be considered primarily as for the benefit of the people of the section as a whole and particularly the domestic and rural consumers to whom the power can economically be made available, and accordingly that sale to and use by industry shall be a secondary purpose, to be utilized principally to secure a sufficiently high load factor and revenue returns which will permit domestic and rural use at the lowest possible rates and in such manner as to encourage increased domestic and rural use of electricity. It is further hereby declared to be the policy of the Government to utilize the Muscle Shoals properties so far as may be necessary to improve, increase, and cheapen the production of fertilizer and fertilizer ingredients by carrying out the provisions of this Act.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: *Provided*, That if any State, county, municipality, or other public or cooperative organization of citizens or farmers, not organized or doing business for profit, but primarily for the purpose of supplying electricity to its own citizens or members, or any two or more of such municipalities or organizations, shall construct or agree to construct and maintain a properly designed and built transmission line to the Government reservation upon which is located a Government generating plant, or to a main transmission line owned by the Government or leased by the board and under the control of the board, the board is hereby authorized and directed to con-

tract with such State, county, municipality, or other organization, or two or more of them, for the sale of electricity for a term not exceeding thirty years; and in any such case the board shall give to such State, county municipality, or other organization ample time to fully comply with any local law now in existence or hereafter enacted providing for the necessary legal authority for such State, county, municipality, or other organization to contract with the board for such power: *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further,* That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board: *And provided further,* That the board is hereby authorized to enter into contracts with other power systems for the mutual exchange of unused excess power upon suitable terms, for the conservation of stored water, and as an emergency or breakdown relief.

SEC. 13. Five per centum of the gross proceeds received by the board for the sale of power generated at Dam Num-

bered 2, or from any other hydropower plant hereafter constructed in the State of Alabama, shall be paid to the State of Alabama; and 5 per centum of the gross proceeds from the sale of power generated at Cove Creek Dam, hereinafter provided for, or any other dam located in the State of Tennessee, shall be paid to the State of Tennessee. Upon the completion of said Cove Creek Dam the board shall ascertain how much additional power is thereby generated at Dam Numbered 2 and at any other dam hereafter constructed by the Government of the United States on the Tennessee River, in the State of Alabama, or in the State of Tennessee, and from the gross proceeds of the sale of such additional power 2½ per centum shall be paid to the State of Alabama and 2½ per centum to the State of Tennessee. These percentages shall apply to any other dam that may hereafter be constructed and controlled and operated by the board on the Tennessee River or any of its tributaries, the main purpose of which is to control flood waters and where the development of electric power is incidental to the operation of such flood-control dam. In ascertaining the gross proceeds from the sale of such power upon which a percentage is paid to the States of Alabama and Tennessee, the board shall not take into consideration the proceeds of any power sold or delivered to the Government of the United States, or any department or agency of the Government of the United States, used in the operation of any locks on the Tennessee River or for any experimental purpose, or for the manufacture of fertilizer or any of the ingredients thereof, or for any other governmental purpose: *Provided,* That the percentages to be paid to the States of Alabama and Tennessee, as provided in this section, shall be subject to revision and change by the board, and any new percentages established by the board, when approved by the President, shall remain in effect until and unless again changed by the board with the approval of the President. No change of said percentages shall be made more often than once in five years, and no change shall be made without giving to the States of Alabama and Tennessee an opportunity to be heard.

SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants at nitrate plant numbered 1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated.

SEC. 15. In the construction of any future dam, steam plant, or other facility, to be used in whole or in part for the generation or transmission of electric power the board is hereby authorized and empowered to issue on the credit of the United States and to sell serial bonds not exceeding $50,000,000 in amount, having a maturity not more than fifty years from the date of issue thereof, and bearing interest not exceeding 3½ per centum per annum. Said bonds shall be issued and sold in amounts and prices approved by the Secretary of the Treasury, but all such bonds as may be so issued and sold shall have equal rank. None of said bonds shall be sold below par, and no fee, commission, or compensation whatever shall be paid to any person, firm, or corporation for handling, negotiating the sale, or selling the said bonds. All of such bonds so issued and sold shall have all the rights and privileges accorded by law to Panama Canal bonds, authorized by section 8 of the Act of June 28, 1902, chapter 1302, as amended by the Act of December 21, 1905 (ch. 3, sec. 1, 34 Stat. 5), as now compiled in section 743 of title 31 of the United States Code. All funds derived from the sale of such bonds shall be paid over to the Corporation.

SEC. 16. The board, whenever the President deems it advisable, is hereby empowered and directed to complete Dam

Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the additional power unit in the steam plant at nitrate plant numbered 2.

SEC. 17. The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct, either directly or by contract to the lowest responsible bidder, after due advertisement, a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam: *Provided, however,* That the President is hereby authorized by appropriate order to direct the employment by the Secretary of War, or by the Secretary of the Interior, of such engineer or engineers as he may designate, to perform such duties and obligations as he may deem proper, either in the drawing of plans and specifications for said dam, or to perform any other work in the building or construction of the same. The President may, by such order, place the control of the construction of said dam in the hands of such engineer or engineers taken from private life as he may desire: *And provided further,* That the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there has been any undue or unfair

advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights.

SEC. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam, transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River.

SEC. 19. The Corporation, as an instrumentality and agency of the Government of the United States for the purpose of executing its constitutional powers, shall have access to the Patent Office of the United States for the purpose of studying, ascertaining, and copying all methods, formulæ, and scientific information (not including access to pending applications for patents) necessary to enable the Corporation to use and employ the most efficacious and economical process for the production of fixed nitrogen, or

any essential ingredient of fertilizer, or any method of improving and cheapening the production of hydroelectric power, and any owner of a patent whose patent rights may have been thus in any way copied, used, infringed, or employed by the exercise of this authority by the Corporation shall have as the exclusive remedy a cause of action against the Corporation to be instituted and prosecuted on the equity side of the appropriate district court of the United States, for the recovery of reasonable compensation for such infringement. The Commissioner of Patents shall furnish to the Corporation, at its request and without payment of fees, copies of documents on file in his office: *Provided*, That the benefits of this section shall not apply to any art, machine, method of manufacture, or composition of matter, discovered or invented by such employee during the time of his employment or service with the Corporation or with the Government of the United States.

SEC. 20. The Government of the United States hereby reserves the right, in case of war or national emergency declared by Congress, to take possession of all or any part of the property described or referred to in this Act for the purpose of manufacturing explosives or for other war purposes; but, if this right is exercised by the Government, it shall pay the reasonable and fair damages that may be suffered by any party whose contract for the purchase of electric power or fixed nitrogen or fertilizer ingredients is hereby violated, after the amount of the damages has been fixed by the United States Court of Claims in proceedings instituted and conducted for that purpose under rules prescribed by the court.

SEC. 21. (a) All general penal statutes relating to the larceny, embezzlement, conversion, or to the improper handling, retention, use or disposal of public moneys or property of the United States, shall apply to the moneys and property of the Corporation and to moneys and properties of the United States intrusted to the Corporation.

(b) Any person who, with intent to defraud the Corporation, or to deceive any director, officer, or employee of the Corporation or any officer or employee of the United

States (1) makes any false entry in any book of the Corporation, or (2) makes any false report or statement for the Corporation, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than five years, or both.

(c) Any person who shall receive any compensation, rebate, or reward, or shall enter into any conspiracy, collusion, or agreement, express or implied, with intent to defraud the Corporation or wrongfully and unlawfully to defeat its purposes, shall, on conviction thereof, be fined not more than $5,000 or imprisoned not more than five years, or both.

SEC. 22. To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act, and to provide for the general welfare of the citizens of said areas, the President is hereby authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and nature of development that may be equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end.

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the general purposes stated in said section.

and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin.

SEC. 24. For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary in the carrying out of any of the provisions of this Act, the President of the United States for a period of three years from the date of the enactment of this Act, is hereby authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after the enactment of this Act, the President is further authorized to sell or lease any parcel or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this Act. Any such contract made by the President of the United States shall be carried out by the board: *Provided*, That no such contract shall be made that will in any way abridge or take away the preference right to purchase power given in this Act to States, counties, municipalities,

or farm organizations: *Provided further*, That no lease shall be for a term to exceed fifty years: *Provided further*, That any sale shall be on condition that said land shall be used for industrial purposes only.

SEC. 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America.

Upon the filing of a petition for condemnation and for the purpose of ascertaining the value of the property to be acquired, and assessing the compensation to be paid, the court shall appoint three commissioners who shall be disinterested persons and who shall take and subscribe an oath that they do not own any lands, or interest or easement in any lands, which it may be desirable for the United States to acquire in the furtherance of said project, and such commissioners shall not be selected from the locality wherein the land sought to be condemned lies. Such commissioners shall receive a per diem of not to exceed $15 for their services, together with an additional amount of $5 per day for subsistence for time actually spent in performing their duties as commissioners.

It shall be the duty of such commissioners to examine into the value of the lands sought to be condemned, to conduct hearings and receive evidence, and generally to take such appropriate steps as may be proper for the determination of the value of the said lands sought to be condemned, and for such purpose the commissioners are authorized to administer oaths and subpœna witnesses, which said witnesses shall receive the same fees as are provided for witnesses in the Federal courts. The said commissioners shall thereupon file a report setting forth their conclusions as to

the value of the said property sought to be condemned, making a separate award and valuation in the premises with respect to each separate parcel involved. Upon the filing of such award in court the clerk of said court shall give notice of the filing of such award to the parties to said proceeding, in manner and form as directed by the judge of said court.

Either or both parties may file exceptions to the award of said commissioners within twenty days from the date of the filing of said award in court. Exceptions filed to such award shall be heard before three Federal district judges unless the parties, in writing, in person, or by their attorneys, stipulate that the exceptions may be heard before a lesser number of judges. On such hearing such judges shall pass de novo upon the proceedings had before the commissioners, may view the property, and may take additional evidence. Upon such hearings the said judges shall file their own award, fixing therein the value of the property sought to be condemned, regardless of the award previously made by the said commissioners.

At any time within thirty days from the filing of the decision of the district judges upon the hearing on exceptions to the award made by the commissioners, either party may appeal from such decision of the said judges to the circuit court of appeals, and the said circuit court of appeals shall upon the hearing on said appeal dispose of the same upon the record, without regard to the awards or findings theretofore made by the commissioners or the district judges, and such circuit court of appeals shall thereupon fix the value of the said property sought to be condemned.

Upon acceptance of an award by the owner of any property herein provided to be appropriated, and the payment of the money awarded or upon the failure of either party to file exceptions to the award of the commissioners within the time specified, or upon the award of the commissioners, and the payment of the money by the United States pursuant thereto, or the payment of the money awarded into the registry of the court by the Corporation, the title to said property and the right to the possession thereof shall pass to the United States, and the United States shall be

entitled to a writ in the same proceeding to dispossess the former owner of said property, and all lessees, agents, and attorneys of such former owner, and to put the United States, by its corporate creature and agent, the Corporation, into possession of said property.

In the event of any property owned in whole or in part by minors, or insane persons, or incompetent persons, or estates of deceased persons, then the legal representatives of such minors, insane persons, incompetent persons, or estates shall have power, by and with the consent and approval of the trial judge in whose court said matter is for determination, to consent to or reject the awards of the commissioners herein provided for, and in the event that there be no legal representatives, or that the legal representatives for such minors, insane persons, or incompetent persons shall fail or decline to act, then such trial judge may, upon motion, appoint a guardian ad litem to act for such minors, insane persons, or incompetent persons, and such guardian ad litem shall act to the full extent and to the same purpose and effect as his ward could act, if competent, and such guardian ad litem shall be deemed to have full power and authority to respond, to conduct, or to maintain any proceeding herein provided for affecting his said ward.

SEC. 26. The net proceeds derived by the board from the sale of power and any of the products manufactured by the Corporation, after deducting the cost of operation, maintenance, depreciation, amortization, and an amount deemed by the board as necessary to withhold as operating capital, or devoted by the board to new construction, shall be paid into the Treasury of the United States at the end of each calendar year.

SEC. 27. All appropriations necessary to carry out the provisions of this Act are hereby authorized.

SEC. 28. That all Acts or parts of Acts in conflict herewith are hereby repealed, so far as they affect the operations contemplated by this Act.

SEC. 29. The right to alter, amend, or repeal this Act is hereby expressly declared and reserved, but no such amend-

ment or repeal shall operate to impair the obligation of any contract made by said Corporation under any power conferred by this Act.

SEC. 30. The sections of this Act are hereby declared to be separable, and in the event any one or more sections of this Act be held to be unconstitutional, the same shall not affect the validity of other sections of this Act.

Approved May 18th, 1933.

[PUBLIC—No. 412—74TH CONGRESS.]
[H. R. 8632.]
AN ACT.

To amend an Act entitled "An Act to improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes", approved May 18, 1933.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subdivision (i) of section 4 of the Act entitled "An Act to improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes", approved May 18, 1933, be, and the same is hereby, amended by adding thereto the following proviso: "*Provided*, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in sections 258a to 258e, inclusive, of Title 40 of the United States Code."

SEC. 2. That subdivision (j) of said section 4 of said Act be, and the same is hereby, amended to read as follows:

"(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system."

SEC. 3. That said section 4 of said Act be, and the same is hereby, further amended by adding a new subdivision, (k), at the end of said section as follows:

"(k) At any time before the expiration of five years from the date when this section, as amended, becomes law may in the name of and as agent for the United States and subject to approval of the President, dispose of any of such real property as in the judgment of the Board may be no longer necessary in carrying out the purposes of this Act, but no land shall be conveyed on which there is a permanent dam, hydraulic power plant, fertilizer plant or munitions plant, heretofore or hereafter built by or for the United States or for the Authority."

SEC. 4. That subdivision (c) of section 5 of said Act be, and the same is hereby, amended to read as follows:

"(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer

practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise."

SEC. 5. That said Act be, and the same is hereby, further amended by adding a new section after section 9 of said Act, as follows:

"SEC. 9a. The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this act provided, and thereby, so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority."

SEC. 6. That section 10 of said Act be, and the same is hereby, amended by adding thereto a proviso as follows: "*Provided further*, That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board: *Provided further*, That in order to supply farms and small villages with electric power directly as contemplated by this section, the Board in its discretion shall have power to acquire existing electric facilities used in serving such farms and small villages: *And provided further*, That the terms 'States', 'counties', and 'municipalities' as used in this Act shall be construed to include the public agencies of any of them unless the context requires a different construction."

SEC. 7. That said Act be, and the same is hereby, further amended by adding a new section after section 12 of said Act, as follows:

"SEC. 12a. In order (1) to facilitate the disposition of the surplus power of the Corporation according to the policies set forth in this Act; (2) to give effect to the priority herein accorded to States, counties, municipalities, and nonprofit organizations in the purchase of such power by enabling them to acquire facilities for the distribution of such power; and (3) at the same time to preserve existing distribution facilities as going concerns and avoid duplication of such facilities, the Board is authorized to advise and cooperate with and assist, by extending credit for a period of not exceeding five years to, States, Counties, municipalities and nonprofit organizations situated within transmission distance from any dam where such power is generated by the Corporation in acquiring, improving, and operating (a) existing distribution facilities and incidental works, including generating plants; and (b) interconnecting transmission lines; or in acquiring any interest in such facilities, incidental works, and lines."

SEC. 8. That said Act be, and the same is hereby, further amended by adding to section 14 of said Act the following:

"The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board, and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such properties as have been completed during the preceding fiscal year.

"For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete ac-

count of the total cost of generating and transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform system of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is hereby empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Commission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 9 (a) of the 'Tennessee Valley Act of 1933', the Board shall file with each annual report, a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power."

SEC. 9. That said Act be and the same is hereby further amended by adding after section 15 of said Act a new section as follows:

"SEC. 15a. With the approval of the Secretary of the Treasury, the Corporation is authorized to issue bonds not to exceed in the aggregate $50,000,000 outstanding at any one time, which bonds may be sold by the Corporation to obtain funds to carry out the provisions of section 7 of this amendatory Act. Such bonds shall be in such forms and denominations, shall mature within such periods not more than fifty years from the date of their issue, may be redeemable at the option of the Corporation before maturity in such manner as may be stipulated therein, shall bear such rates of interest not exceeding 3½ per centum per annum, shall be subject to such terms and conditions, shall be issued in such manner and amount, and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury: *Provided*, That such bonds shall not be sold at such prices or on such terms as to afford an investment yield to the holders in excess of 3½ per centum per annum. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation should not pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof, which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds issued hereunder, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The

Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this section. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. With the approval of the Secretary of the Treasury, the Corporation shall have power to purchase such bonds in the open market at any time and at any price. No bonds shall be issued hereunder to provide funds or bonds necessary for the performance of any proposed contract negotiated by the Corporation under the authority of section 7 of this amendatory Act until the proposed contract shall have been submitted to and approved by the Federal Power Commission. When any such proposed contract shall have been submitted to the said Commission, the matter shall be given precedence and shall be in every way expedited and the Commission's determination of the matter shall be final. The authority of the Corporation to issue bonds hereunder shall expire at the end of five years from the date when this section as amended herein becomes law, except that such bonds may be issued at any time after the expiration of said period to provide bonds or funds necessary for the performance of any contract entered into by the Corporation, prior to the expiration of said period, under the authority of section 7 of this amendatory Act."

SEC. 10. That section 26 of said Act be, and the same is hereby, amended to read as follows:

"SEC. 26. Commencing July 1, 1936, the proceeds for each fiscal year derived by the Board from the sale of power or any other products manufactured by the Corporation, and from any other activities of the Corporation including the disposition of any real or personal property, shall be paid into the Treasury of the United States at the end of each calendar year, save and except such part of such proceeds as in the opinion of the Board shall be necessary for the Corporation in the operation of dams and reservoirs, in conducting its business in generating, transmitting, and distributing electric energy and in manufacturing, selling, and distributing fertilizer and fertilizer ingredients. A con-

tinuing fund of $1,000,000 is also excepted from the requirements of this section and may be withheld by the Board to defray emergency expenses and to insure continuous operation: *Provided*, That nothing in this section shall be construed to prevent the use by the Board, after June 30, 1936, of proceeds accruing prior to July 1, 1936, for the payment of obligations lawfully incurred prior to such latter date."

SEC. 11. That said Act be, and the same is hereby, further amended by adding after section 26 of said Act a new section, as follows:

"SEC. 26a. The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board.

"In the event the Board shall, within sixty days after their formal submission to the Board, fail to approve any plans or modifications, as the case may be, for construction, operation, or maintenance of any such structures on the Little Tennessee River, the above requirements shall be deemed satisfied, if upon application to the Secretary of War, with due notice to the Corporation, and hearing thereon, such plans or modifications are approved by the said Secretary of War as reasonably adequate and effective for the unified development and regulation of the Tennessee River system.

"Such construction, commencement of construction, operation, or maintenance of any structures or parts thereof in violation of the provisions of this section may be pre-

vented, and the removal or discontinuation thereof required by the injunction or order of any district court exercising jurisdiction in any district in which such structures or parts thereof may be situated, and the Corporation is hereby authorized to bring appropriate proceedings to this end.

"The requirements of this section shall not be construed to be a substitute for the requirements of any other law of the United States or of any State, now in effect or hereafter enacted, but shall be in addition thereto, so that any approval, license, permit, or other sanction now or hereafter required by the provisions of any such law for the construction, operation, or maintenance of any structures whatever, except such as may be constructed, operated, or maintained by the Corporation, shall be required, notwithstanding the provisions of this section."

SEC. 12. That said Act be, and the same is hereby, further amended by adding at the end of said Act a new section, as follows:

"SEC. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: *Provided*, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 3 of this amendatory Act."

SEC. 13. That section 4 of said Act of May 18, 1933 (48 Stat. 58), be amended by adding subsection (l) as follows:

"(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other

necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end."

SEC. 14. That subsection (b) of section 9 of said Act be and the same is hereby amended to read as follows:

"(b) All purchases and contracts for supplies or services, except for personal services, made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition: *Provided*, That advertisement shall not be required when, (1) an emergency requires immediate delivery of the supplies or performance of the services; or (2) repair parts, accessories, supplemental equipment, or services are required for supplies or services previously furnished or contracted for; or (3) the aggregate amount involved in any purchase of supplies or procurement of services does not exceed $500; in which cases such purchases of supplies or procurement of services may be made in the open market in the manner common among businessmen: *Provided further*, That in comparing bids and in making awards the Board may consider such factors as relative quality and adaptability of supplies or services, the bidder's financial responsibility, skill, experience, record of integrity in dealing, ability to furnish repairs and maintenance services, the time of delivery or performance offered, and whether the bidder has complied with the specifications.

"The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property, and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one

for public inspection at the principal office of the Corporation, and the other to be retained by him for the uses of the Congress: *Provided*, That such report shall not be made until the Corporation shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General or the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties entrusted to the Corporation by law."

SEC. 15. That the sections of this Act are hereby declared to be separable, and in the event of any one or more sections of this Act, or parts thereof, be held to be unconstitutional, such holding shall not affect the validity of other sections or parts of this Act.

Approved, August 31, 1935.

APPENDIX "B".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE, NORTHERN DIVISION

In Equity. No. 228

THE TENNESSEE ELECTRIC POWER COMPANY *et al., Complainants,*

v.

TENNESSEE VALLEY AUTHORITY *et al., Defendants.*

Decided January 21st, 1938.

Before Allen, Circuit Judge, and Gore and Martin, District Judges.

ALLEN, *Circuit Judge:*

Complainants have filed a bill in equity praying for relief against the operation of the Tennessee Valley Authority Act of 1933, as amended (48 Stat. 58; 49 Stat. 1075; 16 U. S. C. 831 et seq.). The bill joins as defendants the Tennessee Valley Authority, the agency created by the Congress to carry out the provisions of these statutes, and Arthur E. Morgan, David E. Lilienthal, and Harcourt A. Morgan, who are the chief executive officers of the Authority and constitute its board of directors.

The complainants are nineteen companies generating, transmitting and distributing power within Tennessee, Alabama, Mississippi, North Carolina, South Carolina, Kentucky, Virginia, West Virginia, and Georgia, one of which, the Georgia Power Company has been enjoined from participating in this action by the United States District Court for the Northern District of Georgia (*Georgia Power Co. v. Tennessee Valley Authority*, 17 Fed. Supp. 769). This decree has been affirmed by the Court of Appeals for the Fifth Circuit (89 Fed. (2d) 218). For this reason we give no consideration to alleged competition of the Authority with the Georgia Power Company.

The complainants are in general owned by holding companies, as set forth in the findings of fact. They are all taxpayers, citizens of and authorized to do business within the states in which they operate, and none of them claims to operate under any exclusive franchise.

The bill cannot be summarized within the appropriate limits for a trial court's opinion. In addition to its seventy pages of pleading and sixty-five pages of exhibits, it contains within the bill itself much that is argumentative, repetitious and immaterial to the legal questions presented. It charges coercion, fraud and conspiracy on the part of the defendants officially and individually. It charges that Secretary Harold L. Ickes, Public Works Administrator, has joined with the Authority in certain coercion and conspiracy against the legal rights of these complainants. The argumentative matter and conclusions which we deem immaterial are so interwoven with allegations bearing upon the legal questions presented that it is impossible to extricate them. The same statement is true of the prayer. Paragraphs h, i, l, o, p and q of the prayer are considered by the court to have no relation to this case under *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, which held that such matter presents no justiciable controversy (p. 324). It suffices, therefore, to say that in its essential and material features the bill seeks a decree holding that the Tennessee Valley Authority Act of 1933 as amended, and the acts generally done by the board of directors thereunder and individually violate the Constitution of the United States. It seeks an injunction restraining the defendants, their agents and employees, from carrying out the provisions of the statute with reference to the sale of electric power, from purchasing, constructing or otherwise acquiring electric generating plants, transmission lines or distribution lines, or from selling electric energy, except such energy as may be produced at Wilson Dam, "to the extent the production and sale of power at Wilson Dam has been held legal." For practical purposes this bill seeks to enjoin the further construction of TVA dams now in process of construction in the Tennessee Valley, the construction of new dams in such valley for which specific ap-

propriation has been made by Congress, and the operation for generation and sale of electric power of all TVA dams built and to be built.

The answer denies the material allegations of the bill. Only one of the affirmative defenses requires special mention. The defendants claim that certain of the complainants are estopped to deny the constitutionality of the TVA statutes because of extensive purchases of power from the Authority. These purchases were made under the contract of January 4, 1934, by which certain complainants contracted with the Authority to transfer to the Authority their plants, lines, equipment, customers and franchises within certain counties within Mississippi and Alabama for a valuable consideration and upon the condition that the Authority would not operate within those states outside of the counties specified. The properties have been transferred and the contract to date has been fully performed. The court has ruled in favor of the complainants on this contention, and has held that the record presents no essential difference from the situation covered by the ruling as to estoppel in the *Ashwander* case, *supra*, at 323, and therefore this question will not be discussed.

After a trial which consumed about seven weeks, in which approximately 1,100 exhibits were offered, the material issues in the case as briefed, argued and outlined in the actual testimony are defined as follows:

(1) Whether the Authority is engaged in acts constituting in law malice, coercion, and duress, to the injury of complainants.

(2) Whether the Authority and the individual defendants have conspired with Secretary Ickes and the Public Works Administration to induce municipalities and cooperative associations through loan grant agreements from the Public Works Administration to set up their own distribution systems and to coerce them into executing contracts for purchase of TVA power by threat of denial or cancellation of such PWA loan grants.

(3) Whether the acts of the defendants are authorized by the TVA statutes.

(4) Whether the act itself is unconstitutional and void, and the acts done under it are illegal because the Congress is not empowered either under the interstate commerce clause, Art. I, Section 8, or under the national defense powers, Art. I, Section 8, of the United States Constitution, to enact the TVA statutes.

(5) Whether the generation of electricity at the TVA dams is unlawful because it is inconsistent with the regulation of interstate commerce, with flood control, with the improvement of navigation on a navigable river, and with purposes of national defense.

(6) Whether the method of disposition of electric energy authorized by the TVA statutes is appropriate and constitutional under the power to dispose of Government property conferred upon the Congress by Section 3 of Article IV of the Constitution.

Each of the dams constructed, in process of construction and proposed for the TVA system, while varying somewhat in use, as hereafter set forth, is a unit of an integrated multiple-purpose project, the system being designed for coordinated use of the full benefits of the river along the line of navigation, flood control, national defense and power development. Wherever water falls power is created, and one of the express purposes of the TVA statutes is that hydro-electric power so created shall be sold to assist in liquidating the cost of the project. This is in line with the general development of the conservation movement from 1908 to the present, as it relates to streams. See National Waterways Commission Report, Senate Document 469, 62d Congress, Second Session, Appendix I, pages 27, 52, 61, 82, 85, 87; Statement of Chairman of Federal Power Commission, House Document 395, 73d Congress, Second Session, page 54; Report of National Resources Board, pages 263, 264. Similar provisions on river projects have been embodied in previous legislation. In 1912 a statute was enacted authorizing the Secretary of War to provide in navigation dams, in order to make possible the economical future development of water power, such foundations, sluices, and other works as may be considered desirable

for the development of such power. 37 Stat. 233. The Boulder Dam Project Act of 1928 (45 Stat. 1057) provided for a multiple-purpose project for irrigation, flood control, improvement of navigation and generation of power. As fully appears from the opinion in *Arizona* v. *California,* 283 U. S. 423, navigation on the Colorado River was negligible in comparison with navigation on the Tennessee River on the record in this case. Though navigation on the Colorado River had ceased, the project of reclaiming its navigability was held by the Supreme Court to establish the constitutionality of the multiple-purpose project, including the generation and sale of power.

TVA Project

Pursuant to the TVA statute as amended and to subsequent related enactments, the Authority has constructed and is planning to construct seven high dams on the main channel of the Tennessee River, and certain dams on its tributaries. The Tennessee River is formed by the confluence of the Holston and French Broad Rivers in the east-central part of Tennessee. It flows southwesterly across the eastern part of Tennessee into Alabama, westerly across the northern part of Alabama, northerly between Alabama and Mississippi, and across the western part of Tennessee and Kentucky, and empties into the Ohio River near Paducah, Kentucky. Its length is 652 miles, and its drainage basin is 40,600 square miles. It has eight principal tributaries. The main stream dams, including Wilson, which was constructed previous to 1933, are as follows:

(1) Gilbertsville, on which preliminary investigations are in progress, located in Kentucky about 22 miles from the mouth of the river.

(2) Pickwick Landing Dam, under construction and almost completed, located in Tennessee about 206 miles from the river's mouth.

(3) Wilson Dam, now in operation, constructed by United States Army engineers and transferred to the Authority

under the TVA Act, located at Muscle Shoals, Alabama, about 259 miles from the river's mouth.

(4) Wheeler Dam, construction of which was begun by the United States Army Engineers and completed by the Authority, located in Alabama about 15 miles above Wilson Dam and about 275 miles from the river's mouth. This dam is now in operation.

(5) Guntersville Dam, under construction, located near Guntersville, Alabama, 349 miles from the mouth of the river.

(6) Chickamauga Dam, now under construction, located near Chattanooga, Tennessee, 471 miles from the mouth of the river.

(7) Watts Bar Dam, on which preliminary investigations are in progress, located in Tennessee about 530 miles from the mouth of the river.

(8) Coulter Shoals Dam, on which preliminary investigations are in progress, located in Tennessee 602 miles from the river's mouth.

The tributary dams are Norris, completed and in operation, located in Tennessee on the Clinch River about 79 miles from the mouth of the Clinch and about 647 miles from the mouth of the Tennessee, and Hiwassee Dam, now under construction, located in North Carolina on the Hiwassee River about 75 miles from the mouth of that river and about 560 miles from the mouth of the Tennessee River.

A third tributary reservoir, Fontana, on the French Broad River, is recommended by the Authority, but the Congress has made no specific appropriation for this suggested dam. While Wheeler and Norris are the only dams built by the Authority which are completed and in operation, they coordinate in use with Wilson at Florence, Alabama. They release water to Wilson, and thus aid in the generation of power at Wilson. Wilson Dam was built under the war powers of the Congress, as held in *Ashwander* v. *Tennessee Valley Authority, supra.* While the validity

of Wilson Dam is not and cannot be questioned, its present use in combination with Norris and Wheeler, and its future use in conjunction with Guntersville, Chickamauga and Hiwassee, all of these dams being upstream from Wilson and each being part of an integrated system built for the combined purposes of navigation, flood control, power and national defense, has immediate bearing on this case.

The importance of the Tennessee Drainage Basin has been recognized for over a century and repeated acts of Congress have provided for the canalization of different parts of the river. A canal with locks throughout the length of Muscle Shoals opened to navigation in 1834 fell into disuse. Another Muscle Shoals canal was completed about 1891. The Rivers and Harbors Act of 1890 provided that the Colbert Shoals section should be improved by a lock and a canal. In 1913 the Hale's Bar lock and dam, completed by private interests, provided a canalization of 33 miles of the river below Chattanooga. The Widow's Bar lock and dam below Hale's Bar was completed in 1926. Wilson Dam provided a canalized waterway for 15½ miles from Muscle Shoals. Lock No. 1, immediately below Wilson Dam, was completed in 1926.

These projects were in general unrelated and uncoordinated. This was the situation when a comprehensive survey of the Tennessee basin was ordered in five successive Acts of Congress from 1922 to 1928, resulting in the reports contained in House Document 328. This document contained an exhaustive report by the district engineer and comments thereon, together with recommendations made by the division engineer, the board of engineers for rivers and harbors, and the chief of engineers. It set forth alternate plans for securing a depth of nine feet in the main stream, that is, an improvement for navigation only, and also a plan for the development of the river and its tributaries for purposes of flood control, navigation and power. The suggested plan for the improvement of navigation only involved in one of its phases the building of 32 low dams which would provide a nine-foot navigable channel, but would have no value either for flood control or power.

HOUSE DOCUMENT 328.

The complainants vigorously assert that House Document 328 recommends the low dam plan, as distinguished from the TVA plan. It is of little assistance in this phase of the controversy to rely only upon the recommendations of the various engineers, without studying the text (House Document 328, pages 1-25). As to the report of the district engineer, of which the chief engineers said "There has never been presented to Congress a more thorough and exhaustive stu'y", the board of engineers for rivers and harbors, in its conclusions on the various projects presented, stated that "The construction of the storage reservoirs (on the tributaries) described in this report would have a favorable effect in reducing floods on the Tennessee River and on the lower portions of its tributaries" (p. 23). It declared that "The improvement of the Tennessee from its mouth to Knoxville by a series of low movable dams without power development would have practically no effect on floods" (p. 23). It also said, speaking of low-lift dams, that "Such a waterway would be inferior to the high-dam developments and would not permit the economical development of power" (p. 13). The board of engineers pointed out that in addition to having no value whatever for flood control, the 32 low dams, though less expensive to construct than the high dams, provided a navigation channel inferior to that of the high dam plan.

It stated its opinion that the river "has large potential value as a means of transportation and that its improvement to a depth of nine feet would ultimately make it an important feeder to the Ohio-Mississippi system" (p. 20). It concluded that "It is evident that the full utilization of the resources of this river for the public benefit requires its improvement by means of high dams built for the joint development of power and navigation."

These extracts show that consideration of the bare recommendations, apart from the conclusions expressed, are misleading. In the recommendations the division engineer disagreed with the district engineer who drew the report, as to his estimate of the amount of benefit to navigation. The

board of engineers disagreed on certain points with the division engineer, and the chief of engineers, in certain matters, disagreed with all of his subordinates. But the projects actually recommended by each of these engineers were not in essential features the same as those embodied in the TVA statutes. They provided for the development of the river by private interests, or by a combination of private interests and the Government.

In order to carry out this policy, the Rivers and Harbors Act was passed in 1930, extending to private interests on certain conditions the right to develop the river by a series of high dams in co-operation with the Government. No private interest availed itself of the opportunity and in 1933 Congress delegated the task to an agency of the Government.

The program adopted by the Authority, in its main features, and the choice of the sites for the various dams, follow the broader multiple-project plan outlined in House Document 328 (p. 43), commended by the board of engineers of rivers and harbors, as superior to the low dam plan. This multiple project contemplated the erection of seven high dams in the main stream (in addition to Wilson, which had already been built), and reservoirs on the tributaries.

Uses of the Dams.

The dams on the tributaries, as outlined in House Document 328, and as shown in the evidence, are used and to be used for flood control, water regulation, power and purposes of national defense. Of the completed dams, Norris is so constructed as to be able to retain the entire flood waters of the Clinch in flood season, and was in fact so operated in 1936 and 1937. In 1936 it averted a probable flood at Chattanooga. It also generates power. Releases of water from Norris in the dry season are now used for regulation of stream flow so as to maintain a seven-foot navigable channel throughout the summer. Similar releases will be necessary until the entire series of main-stream dams as planned has been completed. Wheeler backs the water of the Tennessee into a slack water pool providing nine-foot navigation to Guntersville. It generates power and has a

surcharge usable for flood control. It is uncontradicted that the releases from Norris and Wheeler, and from Hiwassee, Guntersville and Chickamauga, as planned, create and will create extra head for continuous water power at Wilson, and thus aid in the national defense. Cf. *Ashwander* v. *Tennessee Valley Authority, supra.*

Of the dams under construction, Guntersville, Chickamauga, and Pickwick Landing are essential to the maintenance of nine-foot navigation. Each of these dams is equipped with electric generators and has a substantial surcharge usable for flood control. Hiwassee, on a tributary, will be used mainly for flood control and power, and for aiding Wilson Dam with water releases at dry season. Until the project is completed it will assist in regulating stream flow, thus improving navigation. Gilbertsville, while authorized by Congress, has only been investigated and surveyed. The plans for this dam have necessarily been delayed because of its size and because of the difficulty of locating suitable rock foundation. It is reasonably estimated that Gilbertsville, when completed, will supply over 4,000,000 acre feet of flood storage, and it is the most important of the series for flood control on the Ohio and the Mississippi The Tennessee contributes materially to the flood crest on the Ohio at Cairo. Its flood flow is almost double its drainage area in relation to other feeders of the Mississippi, because of the high precipitation in the Tennessee Valley which varies from 47.5 inches per year at Knoxville to 51.2 at Paducah on the main stream. The Ohio with its tributaries, including the Tennessee, is the principal feeder to the Mississippi floods. All of the TVA dams, on both the river and the tributaries, are used so far as constructed, are planned, as shown by the official TVA reports, and are required under the statute, to be employed as an integrated, co-oridnated system for the combined purposes of navigation, flood control, power and national defense.

Conspiracy, Coercion and Unlawful Competition.

The bill charges a conspiracy to injure or destroy the complainants' business, to compete unlawfully, to breach the complainants' existing contracts with their customers, to

compel and coerce complainants to sell their plants at distress figures. It charges that the TVA has conspired with and practiced coercion upon municipalities and co-operatives to compel them to set up their own distribution systems for the purpose of selling TVA power at retail. If the record had substantiated the allegations of the bill, grave questions would have been presented. But these allegations have not been established. None of the complainants has sold its property except those covered by the contract of January 4, 1934, a contract entered into at arm's length and not even challenged by complainants as unfair. Since complainants have not sold, they have not been coerced to sell their properties, and the negotiations for sale presented in this record do not evidence acts deemed coercion under settled legal principles. No malice in law is shown on this record. The motive of officials who execute a law is immaterial, even though accompanied by a wrongful purpose. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139, 145.

Unlawful Competition

Neither has unlawful competition been proved. The attempt to show that the Authority has endeavored to persuade complainants' customers to breach their existing contracts for purchase of power from complainants has totally failed. In every case where a customer of the complainants has been lost to the Authority, the cause has been not unlawful competition, but the lawful allurement of substantially lower prices. In every such case the change of relationship has occurred at a time when no contract with any of the complainants was in existence. In fact, it is shown that the TVA does not serve the complainants' customers with direct service except as to industrials and "ceded areas." Thus the municipalities now served by the TVA in Tennessee,—Dayton, Pulaski, and Dickson,—each generated its own power prior to the time when the TVA started selling them power. The positive statement is made by officers of the Mississippi Power & Light Company, the Franklin Power & Light Company, the Holston River Electric Company, the Birmingham Electric Company, the Carolina Power & Light Company, the Appa-

lachian Electric Power Company, the West Virginia Power Company, the Kingsport Company, the East Tennessee Light & Power Company, the Tennessee Eastern Company, and by the Southern Tennessee Power Company, that the TVA serves neither any of its customers direct, nor any wholesale customer by whom distribution is made to any of these utilities' former customers. The TVA serves certain cities and customers formerly served by the Alabama Power Company, but all of these customers are situated or reside within certain counties called the "ceded area" in which it was contracted in the agreement of January 4, 1934, by the Alabama Power Company, that its lines should be sold to the TVA within that area, and that the TVA should serve within that district and nowhere else in Alabama. The TVA is serving nowhere else in Alabama except within this area. The Mississippi Power Company has made a similar contract with the TVA, and the TVA is not serving outside of the "ceded area" in Mississippi. No fraudulent attempt has been made to secure complainants' markets. Whatever compulsion exists is the inevitable compulsion exercised by the fact that a competitor sells at lower rates than complainants. But if the operation of the TVA is legal, the complainants have no legal right not to be subjected to such competition even though it curtail or destroy their business. *Alabama Power Co.* v. *Ickes*, 293 U. S. —, decided January 3, 1938.

Conspiracy With Public Works Administration.

The complainants allege that the defendants have conspired with the Public Works Administration to finance the construction of duplicating distribution lines and systems in various municipalities and co-operatives for the purpose of using TVA power and selling that power at rates so low as to constitute competition destructive to complainants' business. Numerous contracts are introduced in evidence between the Public Works Administration and municipalities and co-operatives, providing for the financing of electrical distribution projects. The power is being sold, or is contracted to be sold, to these municipalities and co-operatives at wholesale by TVA.

The facts do not establish a conspiracy. It is not questioned that loans were made within the provisions of the Public Works Administration statute. The validity of that statute is not attacked in this proceeding, and we therefore assume that it is valid. The acts done by Secretary Ickes and his subordinates have been done under the purview of the controlling statute. Their acts are presmued to be valid. Where no fraud, malice, or coercion is shown, co-operative action by two groups of public officials in administering the provisions of two statutes, does not constitute conspiracy. The decisions relied on by complainants with respect to unlawful concert, plan or design, involve a plan either to commit an unlawful act or to commit acts otherwise lawful with the intent to violate a statute, or commit an unlawful act. Cf. *Swift and Company* v. *United States*, 196 U. S. 375. The acts done by the officials of the Public Works Administration in co-operation with the officials of the TVA, as shown by this record, were done with the intent to carry out the provisions of the Public Works Administration statute; the acts done by the TVA in co-operation with the Public Works Administration were done with the intent to carry out the TVA statute. Intent to execute a valid and existing law is not evidence of illegality. As to the transactions of the Public Works Administration, no evidence of conspiracy is presented.

Coercion Upon Municipalities and Co-Operatives.

Certain officials and employees of the TVA gave information, counsel and encouragement to municipalities and co-operatives at the request of such municipalities and co-operatives with respect to the general feasibility of setting up distribution systems for TVA power. The decision on such matters was made by the municipality or co-operative concerned. Under the statutes of Alabama, Tennessee and Mississippi, hereinafter cited, both municipalities and rural co-operatives are authorized to construct generating plants and distribution systems for the purpose of creating and distributing electric energy. Georgia has a similar statute concerning co-operatives. These cities and co-operatives were free to obtain information and counsel from

any source. In each case the decision of the municipality involved was made either by the citizens at an election, or by its duly elected officers. The decision of the co-operative involved was made by its lawful representatives. Presentation by the Authority of facts as to TVA rates and contracts for power given to citizens or officers of a city or rural co-operative at their request do not constitute intimidation or coercion.

DAMAGE.

The record shows that the sales of every one of these complainants and the proceeds of these sales have reached an all-time high in recent years. Several of the most important complainants recently extended their lines, built new plants, and acquired new equipment. The Authority concedes that it sells, or intends to sell, power within a 250-mile radius of the claimed operation of each of these companies, from some one of the dams, built or proposed in the TVA Unified Plan, at substantially lower rates, residential, industrial, and rural, than those of the complainants, and that some displacement of service will result. 250 miles is the distance within which electricity can feasibly be transported from each of the dams. As a result of the lower TVA rates, cities which formerly purchased power from some one of the complainants have taken steps to finance the construction of distribution systems, or have negotiated with the power companies to purchase the existing systems of the power companies, in many instances securing financial aid from the Public Works Administration with the express purpose of selling TVA power through the systems thus acquired. The city of Memphis has issued bonds for this purpose, and under the contract which the city has signed with the Authority, the Memphis Power & Light Company will be deprived of its greatest outlet. A similar proposition has been made, but not yet carried through, in Knoxville. If the arrangement is consummated, the Tennessee Public Service Company and the Carolina Power & Light Company will each be deprived of one of its most profitable customers. A similar situation exists in Chattanooga. The rural co-operatives distribute TVA power, but for the most part they reach areas not

formerly served by these complainants. The Monsanto Chemical Company, which has a large industrial plant near Columbia, Tennessee, has failed to renew its contract for the purchase of power from the Tennessee Electric Power Company, and the Volunteer Portland Cement Company took similar action in failing to renew its contract with the Tennessee Public Service Company.

In view of the inevitable effect of the lower rates of the TVA within this area, and the economic necessity forced upon the complainants of lowering their rates to meet the competitive rates of the Authority, we conclude that the record presents evidence of substantial future damage to these complainants. But such damage constitutes *damnum absque injuria* unless sales of power by the TVA are unlawful. *Alabama Power Co.* v. *Ickes, supra.*

We find in this record no coercion, conspiracy, malice or fraud on the part of the defendants. None existing, the operation of the Authority is lawful unless (1) the defendants are exceeding their statutory authority, or (2) the statute is unconstitutional.

Compliance with the Statute.

Section 9a of the statute reads as follows:

> "The Board is hereby directed in the operation of any dam or reservoir in its possession and control to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. So far as may be consistent with such purposes, the Board is authorized to provide and operate facilities for the generation of electric energy at any such dam for the use of the Corporation and for the use of the United States or any agency thereof, and the Board is further authorized, whenever an opportunity is afforded, to provide and operate facilities for the generation of electric energy in order to avoid the waste of water power, to transmit and market such power as in this Chapter provided, and thereby so far as may be practicable, to assist in liquidating the cost or aid in the maintenance of the projects of the Authority."

It is the principal contention of the complainants that this statute is a sham, pretense, and fraud, and these dams as built and planned cannot and will not be operated within the statute. We therefore consider the actual operation of the dams.

In Water Bulletin No. 1, dated June 30, 1936, adopted by the TVA Board, it was ordered that the reservoirs of the Authority be operated 'First, to serve as navigation channels and maintain navigation depths in the reaches of the river below the reservoirs; and Second, to reduce the magnitude of flood peaks below. Requirements for the control of malaria and temporary needs of construction shall be given due consideration. So far as consistent with the above procedure, as much water power available at the dam shall be converted into electricity as is feasible."

The complainants contend that this order is a sham, and that none of the dams can be or will be operated in compliance therewith. They direct a particular attack upon Norris, which is now completed and in operation. However, Water Bulletin No. 2, dated June 30, 1936, ordered that until further notice water be released from Norris reservoir so as to maintain as nearly as may be a constant flow at Florence, Alabama, of 15,000 c. f. s. The evident purpose was to maintain a constant and sufficient stream flow for Wilson Dam. This and succeeding water bulletins, which are in evidence, outlining the same general policy, have for one of their main purposes the increase of continuous water power at Wilson. Hence, operation of the dams above Wilson is clearly constitutional under the national defense powers of the Congress.

With reference to the general operation, a resolution of the TVA Board, adopted July 1, 1936, created a committee on water control operations, consisting of the chief water control planning engineer and the chief electrical engineer, which committee was and is authorized to prepare general regulations as to the control of water through the operation of reservoirs. The regulations are transmitted to the general manager in the form of bulletins, and at times of flood or emergency, oral instructions are also given. Woodward, the chief water control planning engineer, testified

that he prepares these bulletins and that none is issued without his approval. He stated that he was guided in his operations by the statute, and that the constant flow of 15,000 c. f. s. was maintained at Florence, Alabama, for the purpose of securing the necessary navigable dept in the river. Karr, electrical engineer at Norris, testified that if the limited instructions given to him for operation were such that he had either to violate the instructions or to leave a city without power, "some one would have to go without power temporarily." Woodward testified that he permits the use of the water for power, and in special cases, if extra water is wanted, it is given extra consideration. It is uncontroverted that the water control planning engineer is in direct charge of the regulation of water flow, and also that he regulates water flow from Norris primarily for navigation and flood control.

It appears that in actual operation there is a seasonal drawing down of Norris Dam so that extra storage space may be available during the flood season. Norris was actually operated during the flood of 1937 to reduce the crest on the Tennessee River and to reduce the crest on the Ohio at Cairo. The complainants' expert Kurtz was familiar with the fact that Norris was so operated. Power is produced at Norris. The defendants introduced detailed testimony as to the full amount of TVA power presently produced, the available facilities for generation, the possibilities for future generation, the present load and the load now contracted for.

Complainants urge that the estimated future TVA load set forth in the various TVA reports, and the load it may reasonably be expected to acquire because of its substantially lower rates, will demand that the dams built and to be built be operated in violation of the statute and not (as required in Sec. 9a) in the primary interest of navigation and flood control. But this point is completely refuted by the numerous TVA contracts which are in evidence and are described in the findings of fa

These contracts generally conta .. a clause relieving the Authority of any obligation to supply power when prevented by fire, accident, breakdown, act of God, or an

other causes beyond the Authority's control. Substantially all of these contracts contain the following provision: "Subject to the provisions of the Tennessee Valley Authority Act of 1933 as amended, the parties hereto agree as follows * * *." Under the familiar rule, this provision reads the statute, including its mandatory requirement that the dams and reservoirs be operated primarily for flood control and navigation, into every one of these contracts. Under the contracts with the Arkansas Power and Light Company, the Victor Chemical Works, the Aluminum Company of America dated July 30, 1937, and with the Electro-Metallurgical Company, which are contracts both for firm and secondary power, the Authority is expressly relieved of obligation to supply power when service is interrupted or suspended by reason of floods or back-water caused by floods.

Reading these contracts in conjunction with the statute and the general resolution governing water control above described, it is evident that the long-term contracts of the Authority strongly corroborate (1) the sincerity of the resolution and water bulletins establishing the system of water control in the interest of flood control and navigation; (2) the testimony of Woodward and Karr; (3) the uncontradicted facts as to the principles applied in the actual operation of the dams. The overwhelming weight of the testimony supports defendants' contention that the mandatory provision of the statute that navigation and flood control be given primary consideration both at the other dams, built and planned, and at Norris Dam, is at all times scrupulously followed and that the statute is neither violated nor exceeded.

CONSTITUTIONALITY OF TVA STATUTE MUST BE DETERMINED.

Since no fraud, coercion, conspiracy or malice is shown, and since the Authority has acted within the provisions of the statute under consideration, unless the statute itself is unconstitutional the dams are lawfully erected, the energy is lawfully created, and the water power is the property of the United States. *Ashwander* v. *Tennessee Valley Authority, supra.* It therefore is essential to the decision of the

case pleaded in the bill to determine the constitutionality of this statute.

THE STATUTE.

The complainants contend that the statute was enacted primarily for power purposes, and that flood control, navigation, and national defense are incidental and merely a cloak for the unlawful purpose of permitting the government to enter the power business. The defendants contend that the statute was passed and that dams were erected and are under construction, or were authorized, for the purpose of combined flood control, navigation, and national defense; and that the installation of generators, the creation of power and its sale, have been authorized by the Congress as an incident to the exercise of constitutional powers.

NATIONAL DEFENSE.

Article I, Sec. 8, sub-sec. 1 of the Constitution of the United States, provides that the Congress shall have power "to provide for the common defense and general welfare of the United States."

In pursuance of this power it may make all laws which shall be necessary and proper for carrying into execution the national defense powers. An express purpose of the Tennessee Valley Authority Act is that of maintaining the properties owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of national defense. The amended Tennessee Valley Authority Act, Title 16, U. S. C. A., Section 831p, provides that "The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct * * * a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Num-

bered 2 and at any and all other dams below the said Cove Creek Dam * * *."

In compliance with this provision, Norris Dam was built and is being operated to create extra head of water power at Wilson Dam. This means that constitutional authority to construct Norris exists in addition to the congressional power to authorize the construction of this dam under other clauses of the Constitution of the United States.

Navigation and Flood Control.

The Constitution of the United States, Article I, Section 8, provides that the Congress shall have power to regulate interstate commerce. Commerce includes navigation. *Gibbons* v. *Ogden*, 9 Wheat. 1. Control of navigable waters embraces flood control.

The statute on its face repeatedly stresses navigation and flood control. The purpose clause of the act reads:

> "To improve the navigability and to provide for the flood control of the Tennessee River; to provide for reforestation and the proper use of marginal lands in the Tennessee Valley; to provide for the agricultural and industrial development of said valley; to provide for the national defense by the creation of a corporation for the operation of Government properties at and near Muscle Shoals in the State of Alabama, and for other purposes."

The first paragraph of the enactment creates the Authority for the purpose of maintaining and operating properties owned by the United States in the vicinity of Muscle Shoals in the interest of the national defense and "to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River basins." The board of the Authority is given power (Section 4j) "to contruct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams * * * will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation

on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins." Other sections in which the purposes of navigation and flood control are stressed are Sections 13, 18, 23, and 26a. The most important section is 9a, heretofore quoted, which governs the operation of any dam or reservoir, in the possession and control of the board, and requires the board to regulate the stream flow primarily for the purposes of promoting navigation and controlling floods. Numerous specific provisions of the statute relate to the generation and sale of electric power for the purpose of assisting in liquidating the cost of these projects, but all of them are limited and controlled by this general provision in Section 9a.

Under the statute, therefore, the generation of electric energy is specifically required to be incidental to the exercise of constitutional powers under the interstate commerce clause, and the operation complies with this requirement. The record shows that the dams are adapted by their construction to combined use for flood control and improved navigation, and to generate electricity. All experts agree that the pondage at each of the dams on the main river and also at the storage dams on the tributaries can be drawn down, and that space thereby made available is capable of being used to store flood waters in the rainy season. It appears from the uncontroverted testimony that the erection of the main-river dams will create a nine-foot navigable channel. We find from the weight of the evidence that Norris has been used for the purpose of controlling floods. These facts are not controverted, except by opinion evidence.

Certain expert witnesses, in answer to hypothetical questions, stated that the dams might be operated for the primary purpose of power. Thousands of pages of testimony and exhibits were introduced to show that Congress might have adopted a better plan than the TVA Unified System. Experts equally qualified testified to the contrary.

The court is of opinion that the relative value of these various plans is immaterial, since it has been established that the TVA project is reasonably adapted to use for com-

bined flood control, navigation, power and national defense, and that in actual operation the creation of energy is subordinated to the needs of navigation and flood control.

In short, the contention that the statute and the unified project authorized therein are a sham and pretense is without foundation. It cannot be disputed that the river is navigable and that it occupies a strategic position with relation to floods, both within its own drainage area and on the Ohio-Mississippi. We are not at liberty to conclude that the river is not susceptible of development as an important waterway, nor that it cannot be regulated so as to assist substantially in the control of floods in the alluvial valley of the Mississippi as well as practically eliminating local floods on the Tennessee River. *Ashwander* v. *Tennessee Valley Authority, supra.* Norris will create additional power for use for purposes of national defense at Wilson. Hence, we are not at liberty to conclude that the Congress has not undertaken this specific development for purposes within its constitutional powers, nor that the construction of these high dams and reservoirs along the lines proposed is not an appropriate means to accomplish these legitimate ends. Cf. *Ashwander* v. *Tennessee Valley Authority, supra.* The dams and their power equipment, both constructed, under construction and authorized, must be taken to have been authorized, constructed and planned in the exercise of the constitutional functions of the Government.

Interference with States' Rights.

Complainants contend that the TVA statutes constitute an unlawful interference with the police power of the states because they regulate the rates of utilities which themselves are subject to state regulation. The statute does not fix, nor purport to fix, the complainants' rates. But the contention is that the lower rates of the TVA will inevitably force complainants to lower their rates, and also that the TVA in its operations is not subject to the police power of the state.

The Authority operates within four of the nine states in which these complainants do business, namely, Tennessee, Alabama, Mississippi, and Georgia, its contracts with cities

and co-operatives in Tennessee, Alabama and Mississippi being authorized by express legislation. All municipalities in these three states have the statutory power to own and operate electric distribution systems. General Laws of Mississippi, 1936, Ch. 185; Carmichael Act, Alabama Code, Section 2001 (1), et seq.; Public Acts of Tennessee, 1935, Ch. 32, Tennessee Code, Section 3708 (1) et seq. In Mississippi, Tennessee and Alabama, municipalities are expressly authorized to contract for TVA power and to make agreements with TVA as to resale rates. Ch. 271, General Laws of Mississippi, 1936; Ch. 37, Public Acts of Tennessee 1935, Tennessee Code, Section 3708 (96) et seq.; Alabama Code, Section 687 (62). In Mississippi, Tennessee and Alabama, non-profit membership corporations such as rural co-operatives may operate electric systems, purchase from TVA, and make contracts as to resale rates. This is also true in Georgia, where the North Georgia Membership Corporation is alleged to compete with the Tennessee Electric Power Company. Ch. 184, General Laws of Mississippi, 1936; Ch. 231, Public Acts of Tennessee, 1937, which is an amendment of the Electric Membership Corporation Act of 1935; Alabama Code, Section 687 (18), et seq.; Georgia Laws, 1937, p. 644.

The Supreme Court of Alabama has upheld the validity of the Carmichael Act (Section 2001 (1), et seq., Alabama Code) in *Oppenheim* v. *Florence*, 229 Ala. 50, 155 Sou. 859. The similar act relating to co-operatives was sustained by the Supreme Court of Alabama in *Alabama Power Co.* v. *Cullman County Electric Membership Corp.*, 174 Sou. 866. In Tennessee the Supreme Court has upheld the right of the cities of Memphis and Chattanooga to buy TVA power and to establish their own electric systems under special laws. *Memphis Power & Light Co.* v. *Memphis*, Dec. term, 1936; *Tennessee Electric Power Co.* v. *Chattanooga*, Dec. term, 1936; *Tennessee Public Service Co.* v. *Knoxville*, 170 Tenn. 40.

The actions which the complainants attack are authorized by the states themselves. It is strange doctrine that acts authorized by a sovereign state constitute interference with its sovereign rights because of the fact that they are also

authorized by the Federal Government. We think that deliberate cooperation between the state and the United States, authorized in each case both by the state legislature and by the Congress, constitutes no abdication of any state right.

Moreover, no state has intervened as a party in this proceeding to protest that its laws are violated by the TVA, and no regulatory commission is a party to this action. These complainants are not authorized to object on behalf of the states. *Georgia Power Co.* v. *Tennessee Valley Authority*, 14 Fed. Supp. 673, 676. Questions of the conflict of the TVA statute with the sovereign power of the states are not properly raised until the interested parties are before the court. *Georgia Power Co.* v. *Tennessee Valley Authority, supra.* The TVA statutes do not violate either the Ninth or the Tenth Amendment to the Constitution of the United States.

Since the United States has acquired these dam sites legally, the water power, the right to convert it into electric energy, and the energy produced constitute property belonging to the United States (*Ashwander* v. *Tennessee Valley Authority, supra*). This electric energy may be rightfully disposed of by the United States through the action of the Congress, under Section 3 of Article IV of the Constitution of the United States (*Ashwander* v. *Tennessee Valley Authority, supra*). Since floods frequently recur, and the needs of navigation are continuous, hydro-electric power generated at dams which control floods and improve navigation is continuously created, and the Government may adopt any appropriate constitutional means of disposing of the property. It is not limited in such disposition to a few, or to infrequent transactions. This is the inevitable logic of the *Ashwander* decision, *supra*, at 315, in which every kind of electric facility, many miles of distribution and transmission lines and continuous and permanent operation were called in question because the contract attacked in that case was the contract of January 4, 1934, in which certain of these complainants, for valuable consideration, ceded sixteen counties to the TVA for electric service.

While the Government, in selling its property, performs many functions that would be performed in the operation of a private business trading in similar property, inasmuch as the energy sold is created at dams lawfully erected within the Federal power, the Government in performing these functions is not entering into private business. It is merely using an appropriate method of disposing of its property. The Government may sell land belonging to the United States in competition with a real estate agency, carry parcels in competition with express companies, and manage and control its thousands of square miles of national parks even as a private company. The Government has an equal right to sell hydro-electric power, lawfully created, in competition with a private utility. There is no constitutional authority which denies the Government the right to seek a wider market (*Ashwander* v. *Tennessee Valley Authority, supra*), and the transmission and distribution lines erected are a proper facility for conveying the property of the United States to the market. The creation of the Authority is appropriate. The disposition of the energy is continuous and constant, and it is appropriate that a continuing agency be created in order to carry out this legitimate federal function.

We conclude that, since none of the complainants claims to operate under an exclusive franchise, no fraud, malice, coercion, or conspiracy exists; since the Authority is not exceeding its statutory powers, and since the statute is constitutional, the competition with these complainants is lawful. It follows that the holding in *Alabama Power Co.* v. *Ickes, supra,* recently decided, squarely applies. These complainants have no immunity from lawful competition, even if their business be curtailed or destroyed.

A decree will be entered denying the injunction sought, dismissing the bill of complainants, and taxing costs against the complainants. Findings of fact and conclusions of law will be filed.

* * * * * * *

APPENDIX "C".

Filed May 14, 1937. John W. Menzies, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

No. 7606.

TENNESSEE VALLEY AUTHORITY *et al., Appellants,*

v.

THE TENNESSEE ELECTRIC POWER CO. *et al., Appellees.*

Appeal from the United States District Court for the Eastern District of Tennessee, Northern Division

Decided May 14, 1937

Before Moorman, Simons and Allen, Circuit Judges.

SIMONS, *Circuit Judge:*

Nineteen corporations in the business of generating, transmitting and distributing electric energy as public utilities in the area within and contiguous to the Tennessee river basin commenced a suit in the Chancery Court at Knoxville, Tennessee, against the Tennessee Valley Authority, a corporation organized under special act of Congress, and the three directors of that corporation, to restrain acts being performed or threatened under powers claimed to be conferred by the TVA Act. They allege such acts to be either unauthorized or conferred by an unconstitutional grant of power. The suit was removed by the defendants to the United States District Court for the Eastern District of Tennessee. There a temporary injunction was granted, and the appeal is from the interlocutory decree. The Georgia Power Company, one of the plaintiffs, being restrained by an injunctional order subsequently issued out of the District Court for the Northern District of Georgia, and the Alabama Power Company, another, similarly restrained by the District Court for the Northern District

of Alabama, withdraw their support of the decree, but the remaining plaintiffs defend it.

The bill charges the defendants with having promulgated a program for the construction, development and operation of a great Federally owned and operated public utility system for the generation, transmission and distribution of electricity, in all territory within physical transmission distance of the electric generating plants to be constructed under such program. It charges that with or without the authority of the act they contemplate construction of generating plants at 149 power sites on the Tennessee river and its tributaries, the construction of transmission and distribution lines to gridiron the entire area within 250 miles of such plants; that they plan to produce an amount of electric energy greatly exceeding the total consumption of the area, which includes all of the State of Tennessee and a large part of the six neighboring states. It charges that the execution of this program will irreparably injure if not wholly destroy the business and property of each of the plaintiffs, and that the defendants have already performed or are in process of performing a vast number of acts in the execution of their power program, which is being carried out as rapidly as possible. It charges the program itself, and all of the acts done pursuant to it to be unconstitutional and void, and that if the TVA Act purports to authorize such program, it is to that extent also unconstitutional and void. The defendants first challenged the jurisdiction of the court by motion to quash service of the subpœna, and later the sufficiency of the bill by a motion to dismiss. Upon the overruling of both motions they answered, denying the material allegations of the bill and challenging by supporting affidavits the right of the plaintiffs to either permanent or temporary relief. Their appeal not only assails the preliminary injunction, but brings up the jurisdictional and procedural questions decided against them below.

Jurisdiction must, of course, be first examined. The Tennessee Valley Authority is a public agency. By the terms of the statute creating it, its domicile is in Alabama. Therefore it is asserted that under the laws of Tennessee

actions against it are local and not transitory, and may be brought only in a court of competent jurisdiction at the place of its domicile, and this notwithstanding the fact that the bill charges lack of legal or constitutional authority for acts being or threatened to be performed in Tennessee.

Section 4, of the Tennessee Valley Authority Act, specifically provides that the corporation may sue and be sued in its corporate name. This provision is without qualification. Section 8 (a) is as follows:

> "The Corporation shall maintain its principal office in the immediate vicinity of Muscle Shoals, Alabama. The Corporation shall be held to be an inhabitant and resident of the Northern Judicial District of Alabama within the meaning of the laws of the United States relative to the venue of civil suits."

The laws relating to venue of civil suits are well understood, particularly since the clarification of their interpretation in *Lee v. Chesapeake & Ohio Ry. Co.*, 260 U. S. 653. The present suit was begun in a state court of Tennessee. Under the authority of § 28 of the Judicial Code it was removed to that United States district court within the jurisdiction of which the state court action was pending. Whether a suit may be removed depends upon whether it could have been brought originally in the Federal district courts, which by § 24 of the Judicial Code, so far as applicable, have original jurisdiction of all suits of a civil nature, at common law or in equity, which arise under the Constitution or laws of the United States. This being such a case, it could have been brought originally in a Federal court. The test of removability is not whether the suit could have been brought in the particular district to which it was removed, but whether it could have been brought at all in a Federal district court. The venue of such suit after removal is not the district in which it might have originally been brought, but is the district in which the case is pending, for the right to remove is a personal privilege of the defendant, which he may assert or may waive. *General Investment Co.* v. *Lake Shore & Michigan Southern Ry. Co.*, 260 U. S. 245, 275. No question of Federal juris-

diction here arises by virtue of § 8 (a) of the TVA Act, and the laws in respect to venue.

But while venue is waived by removal of a cause from a State into a Federal court, want of jurisdiction in the State court is not cured thereby, but may be asserted after removal is consummated. *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.*, 258 U. S. 377; *Cain* v. *Commercial Publishing Co.*, 232 U. S. 124, 131; *General Investment Co.* v. *Lake Shore Ry., supra*, 288. It is first urged on behalf of the appellants that they may not be sued in Tennessee because no local statute specifically authorizes suit against a public agency. Section 8676, Shannon's Code, however, provides that any corporation claiming existence under the laws of the United States is subject to suit in Tennessee to the same extent as are local corporations. Denial of the applicability of this statute, based upon the rule that statutes which refer to corporations in general terms do not apply to public agencies, is not persuasive, for the Tennessee statute speaks not in general terms but with precision.

The principal challenge, however, to the jurisdiction of the Tennessee court is based upon the fact that the TVA Authority, being a public agency domiciled in Alabama, may not under the laws of Tennessee be sued in that state since actions against a public agency are local and not transitory, and suit may be brought against it only at its domicile. Authority for the Tennessee rule invoked is the leading case of *Board of Directors of St. Francis Levee District* v. *Bodkin Bros.*, 108 Tenn. 700. There a suit was brought in Tennessee against the Levee District, which was a public corporation of Arkansas authorized to build levees on the Mississippi river. The Arkansas statute authorized it to sue and be sued, but domiciled the corporation in Arkansas. The Supreme Court of Tennessee held actions against such a Board not transitory but local, and that they must be brought at the place of domicile, resting its conclusion upon a rule of public policy, convenience and comity, which requires that public bodies should not be subject to the burden of carrying on law suits in scattered courts, since such suits inevitably hinder and delay the successful conduct of governmental functions.

There is no challenge to the soundness of the rule of the Bodkin case. The question is whether it applies. The origin of, and the reasons underlying the rule were discussed by this court in *Park Co.* v. *City of Decatur*, 138 Fed. 550, 553. There a municipality of Illinois was sued by attachment in the courts of Kentucky. It was said, "As elsewhere, the municipalities of Illinois are localized in their sphere of operation. They have no legal presence elsewhere, and their officials do not and cannot ordinarily represent them abroad, certainly not for the purpose of receiving service of process against them, or giving jurisdiction over them in foreign courts. For this reason and because of the public inconvenience resulting from carrying on litigation in a distant forum, the rule has become quite generally recognized that such corporations cannot be sued elsewhere than in the venue of their location; and because the venue of the courts in the counties of England and the states of the Union is usually, if not universally, coextensive with the boundaries of such counties, the rule is stated in the terms that a suit against a city or town or other limited municipal district must be brought in the courts of the county, and the county itself is only suable there." In fact in *Pack, Wood & Co.* v. *The Township of Greenbush*, 62 Mich. 122, the court indicated that the agents of a township may not bind the township by their acts or doings beyond the limit of the township unless expressly or impliedly authorized, for the localities in which they may exercise and perform them are limited by the boundaries of the township and the county in which it is located. The jurisdiction of a court may not therefore follow the persons of public officers wherever they may go beyond the municipalities for which they were elected or chosen. The Bodkin case does not go beyond this. It construed the Arkansas statute as giving consent to suits against the levee board only where the Board had its situs. Since it cannot have a situs outside of the state of its creation it is not subject to suit in a foreign state, and the levee district as an agency of the government is analagous to counties, municipalities, boards of education and the like.

The Tennessee Valley Authority has no restricted situs. It is authorized under the act to carry on operations upon the Tennessee river and its tributaries without respect to state lines or the limits of judicial districts, and may acquire by purchase or condemnation anywhere, lands, easements or rights of way necessary to carry out the provisions of the act. In the exercise of the power of eminent domain conferred upon it, it may institute proceedings in any district court of the United States, within the jurisdiction of which required lands, easements, rights of way or other interests are located. Indeed, so unfettered is it by political subdivisions that commissioners who are to ascertain the value of property are not to be selected from the locality wherein land sought to be condemned lies. Residence is not synonymous with situs, and the act creating the Authority is replete with provisions pointing to its mobility and the transitory character of its activities. Neither the rule of the Bodkin case nor the reasons which gave it birth limit jurisdiction over an ambulatory corporation of this character to the courts of its domicile. The state court had jurisdiction, and the court below acquired it by removal. It becomes unnecessary to consider other bases of jurisdiction asserted by the plaintiffs.

The challenge to the sufficiency of the bill is based upon two main grounds. It is said that the bill is defective because premised upon an alleged power program which is non-justiciable and because of an improper joinder of parties and causes which renders the bill multifarious, in violation of Equity Rules 26 and 37. In our opinion the existence of multifariousness must depend upon whether a justiciable controversy is presented by allegations of irreparable injury flowing from the authorization, promulgation and substantial initiation of the power program described in the bill. If there is no justiciable controversy between plaintiffs as a class and defendants, and one does not arise in respect to any plaintiff until some concrete act threatening irreparable injury to it is committed or threatened, such as the invasion of its territory by competing lines, the building of generating stations within transmission dis-

tance of its customers or the like, then indeed the bill may be clearly multifarious, and as we understand the argument, so much the plaintiffs are ready to concede. But if the unitary power program, as permitted or commanded by the act, or as promulgated by the directors of the Authority, directly creates or imminently threatens irreparable injury to the plaintiffs, varying in degree, perhaps, in respect to each but identical in kind, then we fail to see misjoinder either of plaintiffs or causes of action, for "a bill is not multifarious that presents a common point of litigation, the decision of which will affect the whole subject matter, and will settle the rights of all the parties to the suit;" Equity Rules 28, U. S. C. A., 114, Compilers Note 227. The general principle is well understood.

In determining the sufficiency of the bill we are not required to examine anything but the structure of the bill itself. *Nelson* v. *Hill*, 5 How. 126, 132. It becomes necessary, therefore, to consider the case made by it. The general program has been described—it remains to consider the injury charged to flow therefrom. Each of the plaintiffs has, it is alleged, valid authority by franchise or otherwise, to carry on its business in the territory it serves either indeterminately or for a period of years. Each operates within transmission distance of electric generating plants constructed, under construction or proposed. Each owns property of great value for the distribution and generation of electric energy within its service territory, with rates fixed by state authority. Each is supplying public utility service as a going concern, with large investments devoted to that purpose. Each has numerous agreements with consumers and reasonable expectancy of renewal of contracts. Each has issued stocks and bonds purchased by the public on the faith and credit of its lawfully granted authority and the protection afforded such investments by the laws of the State and the Constitution of the United States. There exists, it is said, a common threat to the interests of each in that the Tennessee Valley Authority Act permits those charged with its administration to acquire and develop all the water power sites on the Tennessee river and its tributaries, to build and utilize steam plants auxiliary thereto,

to interconnect vast electric generating plants into a superpower system, to acquire and construct transmission or distribution lines throughout the transmission area of these plants, and to distribute and sell power so generated to domestic, commercial, municipal and industrial users of light and power, and the area embraced includes all or a substantial part of the territory in which each plaintiff operates.

In short, it is asserted that the Act permits or commands, and the defendants propose, the construction, development and operation of a mammoth Federally owned and operated system for the generation and distribution of electricity in competition with each plaintiff through all or a substantial part of its territory. Electricity so produced will be sold at a price with which private producers cannot compete because its sale is to be subsidized by the public treasury. It is the purpose of the act and of the persons charged with its administration to eliminate all existing privately owned and operated utilities. Not only is the mere existence of the statute a threat to their business because it depresses the value of their present securities and destroys the market for additional securities required to permit expansion and modernization of properties, but the defendants are threatening to go beyond the clear authority of the act by constructing and operating hydro-electric plants with auxiliary steam plants, by interconnecting such plants into a vast power system, and so to take over the entire market for electricity in the area. The defendants have announced that unless existing utilities sell their transmission lines to them such lines will be duplicated. They have announced their intention to regulate local intrastate rates and service by a so-called "yardstick" method through Federally subsidized competition which will supplant state regulation as inadequate and unsatisfactory. Their power program will be carried out in Kentucky, Alabama, Georgia, North Carolina, Mississippi and Tennessee, and will include such cities as Chattanooga, Knoxville, Birmingham, Memphis and Atlanta. They have conspired with the Federal Public Works Administrator to force the existing utilities in the area, including the plaintiffs, to sell their properties for less than fair value, failing which their properties and services will be duplicated with

monies advanced by the Public Works Administration. In pursuance of this program, it is alleged, definite portions of the area have already been occupied, and the public has been offered contracts for electric energy at confiscatory prices in furtherance of a systematic campaign to injure the plaintiffs and destroy their credit and good will. The general allegations are supported by specific allegations, which it is neither necessary nor convenient to recite. In brief, as was urged in argument, the plaintiffs conceive themselves to be united by a common peril, and united therefore they complain.

To the justiciability of their common grievance, the defendants rely for a complete answer upon specific rulings of the Supreme Court in *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288. They lay the bill in the Ashwander case by the side of the present bill, and by exhaustive comparative analysis urge the conclusiveness of that decision on the issue now under consideration. The "deadly parallel" is frequently devastating, but so only when controversies are substantially identical and of equal breadth. We have given careful consideration to the Ashwalder case. It sustains constitutional power of TVA to enter into a specific contract with the Alabama Power Company, one of the original plaintiffs in the present suit. That contract related solely to the purchase by TVA of transmission lines for disposal of excess energy generated at Wilson dam and for exchange of energy. The Ashwander case was a derivative suit brought by preferred stockholders of the Alabama Power Company to set aside the contract as ultra vires. By limitations imposed upon the court by the nature of the suit, and through limitations of the judicial process, the Ashwander case was kept within very narrow compass.

It is well understood, of course, that a stockholder may not maintain a suit in behalf of his corporation until he has made a demand upon the corporation that it do so, and the corporation has failed or refused to comply. The scope of the suit he may then maintain is limited by the scope of his demand. Ashwander and his fellow-stockholders were primarily concerned with the contract of January 4, 1934, for the sale by the Alabama Power Company of the transmis-

sion lines running from Wilson Dam. The electric energy there generated was more than sufficient to supply all the requirements of the contract. The issues were confined to the constitutional authority for the construction by TVA of Wilson Dam, and for its disposal by reasonable method of the electric energy there generated. Finding the construction of Wilson Dam a valid exercise of constitutional power under the war and commerce clauses, the electric energy there generated to be property of the United States, for the sale of which authority exists in § 3 of Article IV of the Constitution, and the method of disposal not inappropriate according to the nature of the property, the court refused to set aside the contract, the decision concluding with the following: "The question of the constitutional right of the Government to acquire or operate local or urban distribution systems is not involved. We express no opinion as to the validity of such an effort, as to the status of any other dam or power development in the Tennessee valley, whether connected with or apart from the Wilson Dam, or as to the validity of the Tennessee Valley Authority Act or of the claims made in the pronouncements and program of the authority apart from the questions we have discussed in relation to the particular provisions of the contract of January 4, 1934, affecting the Alabama Power Company."

It is true that the stockholders in the Ashwander case sought a declaratory judgment with respect to the constitutional validity of the entire Tennessee Valley activity, and that the court did not recognize in their challenge to the Act, or to other things done in pursuance thereof, a case of actual controversy within the scope of the act of June 14, 1934, providing for declaratory judgments, for "the judicial power does not extend to the determination of abstract questions," and a justiciable controversy does not arise save as pronouncements, policies and programs have "fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining." The court had clearly in mind, however, that the persons complaining in the Ashwander case were stockholders, whose interests might perhaps be affected by the invalidity of a specific contract entered into

by their corporation, but not necessarily or immediately affected by other acts or assertions of authority on the part of the Federal agency involved. This, we think, the court made plain: "While plaintiffs, as stockholders, might insist that the Board of Directors should take appropriate legal measures to extricate the corporation from particular transactions and agreements alleged to be invalid, plaintiffs had no right to demand that the directors should start a litigation to obtain a general declaration of the unconstitutionality of the Tennessee Valley Authority Act in all its bearings or a decision of abstract questions as to the right of the Authority and of the Alabama Power Company in possible contingencies."

The case made by the present bill presents a different aspect. Here are no preferred stockholders whose interests are limited to their distributive share in the assets of the corporation, and whose grievance is circumscribed by their own formulated estimate of it. Here are seventeen utility corporations already suffering the economic pinch of actual or threatened competition they conceive to be illegal, and facing what they conceive to be not only irreparable injury, but possible destruction, not through any one specific act of the defendants which singly considered may not be an unconstitutional exercise of power, but through a far flung program which they charge will inevitably effect and has for its very purpose their common annihilation. We are not convinced that the Ashwander decision precludes us from recognizing a justiciable controversy between these plaintiffs as a class and the Tennessee Valley Authority as an instrumentality of the Government involving the constitutional validity of the described program, whether authorized by the Act or transcending its authority.

Another consideration is of importance. Eighteen months have elapsed since the Ashwander decision in the Supreme Court. Three years have passed since the District Court announced the decision there reviewed. We are told that the program of the Tennessee Valley Authority and its directors has gone forward with all reasonable dispatch. What then may have been merely tentative or speculative may now be approaching realization. What then was re-

mote may now be imminent, and mere concept have fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of those complaining. This may only be determined by full hearing on the merits. Moreover, the distinction between the case here made and that presented by the bill in the Ashwander case is not only clear but is brought into bold relief by the dissenting opinion in the Ashwander case. The injury and threat of injury is here assigned not to a single act or series of acts, but to the entire program, the full sweep of which is illustrated by the acts already done and proposed. The primary grievance in the Ashwander case related to the constitutional power of TVA to execute a specific contract. It was thought by the plaintiffs there to demonstrate invalidity of the contract not merely by challenging the power of the Authority to execute it, but by challenging its power to promulgate and carry into execution a power program of which the assailed contract was but a part, and to test the validity of the very act under the authority of which the program was conceived—even to the extent of seeking a declaratory judgment thereon. The power program was involved only as its possible invalidity might infect with invalidity the assailed contract. The dissent makes it clear that the court rejected the theory that "the plan makes the part unlawful." So while it results that one may not secure relief against an act which is not itself an unconstitutional exercise of power, it also results that one may not complain of a plan which, though possibly open to attack on the ground of constitutional invalidity, does not as such injure him, and this is but an application of the familiar principle that courts will not pass upon the constitutionality of a statute per se, but will set it aside only when both invalidity and direct or imminent danger of injury to the persons complaining of its enforcement are made clear. *Massachusetts v. Mellon*, 262 U. S. 447. The court below did not err in overruling the motion to dismiss.

We reach, therefore, the question as to whether, upon the showing made, the plaintiffs have established their right to a temporary injunction of the scope granted, and upon this issue it is not necessary for us to determine the meritorious

question as to the constitutional validity of the power program, for the ultimate rights of the plaintiffs should be decided only when the court is "in possession of the materials necessary to enable it to do full and complete justice between the parties." *Eagle Glass & Mfg. Co.* v. *Rowe*, 245 U. S. 275; *Interstate Transit Co.* v. *City of Detroit*, 46 Fed. (2d) 42, (C. C. A. 6). Ordinarily upon an appeal from an interlocutory order granting or refusing a temporary injunction, the determination of the trial court will not be disturbed "unless contrary to some rule of equity or the result of improvident exercise of judicial discretion." *Meccano, Ltd.* v. *John Wanamaker*, 253 U. S. 136, 141; *City of Owensboro* v. *Cumberland T. N. T. Co.*, 174 Fed. 739, 747, (C. C. A. 6). The question here presented is not unattended with difficulty. It involves not only the substantial nature and debatable character of the claims of the plaintiffs, the probability of irreparable injury to them, the necessity and appropriateness of an injunction to maintain the status quo, but includes also the usual questions of balance of equities, and the possibility of severe damage to the defendants and to the public interest if the temporary injunction is wrongly issued. Relief is moreover based upon transgression of constitutional power by and under an act of Congress, and decision must ultimately if not presently be made with due regard to the presumption of validity that attaches to such enactment. Finally, the case presents the extraordinary situation in that the authority of the Congress to enact the statute in certain of is aspects, and to authorize thereby certain important transactions in respect to the construction of Wilson Dam, and to the sale and distribution by means of transmission lines of the electric energy there generated, has already been sustained by the Supreme Court, and that other acts and transactions here alleged to illustrate the sweep of the challenged power program are not readily to be distinguished from those heretofore validated. Granted that it is not necessary that the facts in support of a preliminary injunction be established with the same certainty that is required upon final hearing, and that we are not required to prejudge the meritorious controversy, yet it would seem that in a case of this kind, giving

full consideration to the history of the litigation, the gigantic public undertaking involved, the enormous sums of money already expended, the public interest which may not be ignored, and while carefully considering the irreparable injury claimed, considering also possible overbalancing injury to the defendants and the public, the gravity of the factual and constitutional questions involved must be made to appear at least with more clearness than in the ordinary case, if not indeed, as suggested in the concurring opinion in the Ashwander case, "beyond peradventure clear."

Pursuant to the TVA Act, the Tennessee Valley Authority has now completed and put into operation not only the Wilson Dam, in the vicinity of Muscle Shoals, but the Norris Dam on the Clinch river, a tributary of the Tennessee river, and the Wheeler Dam on the Tennessee river. It has also initiated the construction of dams on the Tennessee river at Pickwick Landing, Tennessee, at Gunthersville, Alabama, and Chickamauga, in the vicinity of Chattanooga, Tennessee, and has entered upon preliminary operations for the construction of the Hiwassee Dam on the Hiwassee river, near Murphy, North Carolina. It has also recommended to Congress the construction of three additional dams on the Tennessee river, which, it asserts, will complete the contemplated nine-foot channel from Paducah to Knoxville and provide a substantial measure of flood control on the Tennessee and Mississippi river systems. It has been selling approximately 75% of its available electric power to four of the plaintiffs, and its existing electric service is limited to consumers in the service area of these four companies and of three others complaining.

The District Judge found that the defendants had acquired or constructed extensive electric transmission and rural distribution facilities; had built and are building transmission lines which duplicate those of the plaintiffs; had erected a substantial number of miles of high tension transmission and distribution lines, most of them rural; were actively in competition with some of the plaintiffs, offering electric service at substantially lower rates, and that pending determination of the suit upon its merits the plaintiffs are in danger of irreparable injury through fur-

ther enlargement and extension of facilities, solicitation and negotiation of contracts with actual or potential customers in the plaintiffs' service area, and that loss to the defendants by reason of the injunction would not be comparable to the damage likely to be suffered by the plaintiffs in the event the injunction should issue. Though he deemed it immaterial, he also concluded that the facts of record supported the following proposed finding:

> "All of the transmission lines constructed or acquired, or under construction by the Tennessee Valley Authority, or physically connected with Wilson Dam are within transmission distance of Wilson Dam, except the Santeelah-Hiwassee Transmission line and substation. All of the power now being sold by the Authority is being delivered by means of these lines or by interchanges under the contract of January 4th. The present dependable capacity of Wilson Dam is in excess of the present power requirements of the existing customers of the Authority excluding complainant power companies. The present load now being sold to customers of the Authority other than the complainant power companies, is approximately 22,500 kw. The maximum amount of power that it is reasonably possible for the Authority to dispose of up to May 1st, 1937, by the use of facilities already existing or which may be constructed up to May 1st, 1937, is 37,000 kw."

Concluding that the suit raised grave questions both of law and of fact with reference to the validity of the Tennessee Valley Authority Act, and of the acts of the defendants done and being done in reliance upon it, he enjoined them from enlarging or extending their facilities other than the completion of certain lines and sub-stations in process of construction, from serving consumers not already served, from initiating new construction, from soliciting or negotiating contracts with customers of the plaintiffs, or consumers in their service areas, from supplying service connections to existing rural lines, and in the main from enlarging the service beyond the scope of the project already established. While it is unnecessary to recite all of the

provisions of the injunctional order, it must be conceded that it is sweeping. Less would perhaps not have sufficed the plaintiffs in view of the scope of their claims of irreparable injury, and more would doubtless have resulted in complete paralysis of the entire activity.

We have already indicated some of the considerations that must control decision upon the propriety of a temporary injunction. A complete catalogue cannot, of course, be compiled. A petitioner's own appraisal of his fears is not to be disregarded, so it is important to note that the bill when filed contained no prayer for preliminary relief, was not amended to pray for it until long after suit had been begun, and in this respect was brought up for hearing more than six months after its filing date. It is also important to note that the trial judge in the Ashwander case, although subsequently holding the Tennessee Valley Authority's disposal of power illegal, refused to grant a preliminary injunction, and that Judge Sibley of the Fifth Circuit Court of Appeals, sitting by designation in the Northern District of Georgia, likewise refused to preliminarily restrain the activity of the defendants in the area served by the Georgia Power Company, one of the original plaintiffs here (*Georgia Power Co.* v. *Tennessee Valley Authority et al.*, decided May 28, 1936).

However grandiose may be the conception of its directors as to ultimate scope of the TVA project, it is clear, we think, that the presently contemplated plan includes provision only for a nine-foot level for navigation and flood control purposes on the Tennessee river. This will be accomplished by the seven dams building and proposed. There is no occasion, therefore, on the question of irreparable injury *pendente lite* to consider the effect of 149 inter-connected power supplying projects upon the rights of the plaintiffs in the present inquiry, however important that may become on final hearing. Nor is it to be supposed that all or substantially all of the construction already entered upon or planned can possibly be completed before the pending case may be reached and tried upon its merits. The trial judge found substantial support for a finding that the maximum amount of power reasonably possible for the

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Authority to dispose of up to May 1, 1937, by the use of existing facilities, or those which might be constructed up to May 1, 1937, to be 37,000 kw. Without denying that some injury may be suffered if the injunction is lifted, it does not so clearly appear that it will of necessity overbalance the injury which must inevitably be suffered by the defendants and the public.

The possibility of maintaining the status quo by means of the injunction is not established. The court may not command the waters of the Tennessee river and its tributaries to cease their flow. The peculiar property that inheres in the power of falling water, and in the electric energy into which it may be translated, if not used, is forever lost. It is, moreover, inescapable that in the conduct of an activity of the size and scope herein delineated, a great organization must necessarily have been built up, including not only laborers, equipment and executives, but technological experts and specialists of many kinds. To appraise the injury to the defendants from the disorganization which must follow substantial or even partial cessation of activity is impossible, but that it will be great cannot be denied. So also in respect to the public interest involved. The loss, inconvenience and discomfort of the residents of the area in failing to obtain cheap electric energy, if it be found in the end that it may lawfully be supplied to them, may likewise not be measured, but equally incontrovertible is it that it will be great. Insofar, also, as restraint will delay effective control of the flood waters of the Tennessee river and its tributaries, the public interest in the achievement of that objective is similarly beyond appraisal. Human experience of the catastrophic effect upon great areas of overflowing rivers is too recent and too painful to permit of any doubt either as to the existence or extent of the public interest that is threatened by the maintenance of the injunction, and against which the threat to private interests must be balanced. From such possible injury it is clear no bond can adequately safeguard the public interest.

There is no occasion at this time to review the principles which govern courts in passing upon constitutional questions. The cases announcing them have been collected in

the concurring opinion of the Ashwander case, and public attention is presently focused upon them. The great power of the courts to set aside an act of Congress is exerted with reluctance in the ordinary case. It is invoked with even greater caution where great public enterprises are involved, and while it will be exercised only when it is absolutely necessary, this applies with even greater force on appeals from an interlocutory injunction [*Allen* v. *Omaha Live Stock Co.*, 275 Fed. 1, 3 (C. C. A. 8)], for as was said by Judge Learned Hand, "We are told that to declare a statute unconstitutional we must be assured beyond question that it is such. A temporary stay now is a declaration for a time that it is unconstitutional; it is to dispense with the statute until the case be finally decided." *Dryfoos* v. *Edwards*, 284 Fed. 596, 603.

It is our conclusion under all of the circumstances of the case that the interlocutory injunction was improvidently granted, and should be set aside. We have given serious consideration to both the private interests and the public enterprise involved, and while "Elusive interests of haste should not be permitted to obscure substantial requirements of ordinary procedure" (*Duke Power Co.* v. *Greenwood Co.*, 299 U. S. 259, 268), both are so important that undue delay in arriving at final judgment must likewise be avoided. To that end we have contributed as best we may by advancing the cause for argument and giving precedence to it in decision on present issues. We have no doubt that the District Judge, whose earnest application to the problems presented and whose courageous assumption of responsibility in respect to them is so evident upon this record, will cooperate with counsel to bring the cause to early hearing and disposition upon its merits.

Interlocutory decree reversed, and cause remanded for trial.

ALLEN, *Circuit Judge*, concurring:

I concur with the conclusion and in the main in the opinion, but think that in addition to ruling upon the questions raised in this appeal, the court should lay down rules for the guidance of trial courts as to the practice of issu-

ing temporary injunctions which in effect suspend the operation of statutes.

The considerations which govern the issuance of temporary injunctions in a suit between private parties have often been applied in injunction suits against public officials, where the damage to the public is readily ascertainable and where the public interest may be properly protected. However, the decisions recognize a clear distinction where the damage to the public cannot be readily appraised and where the acts complained of involve, as here, a public policy authorized by statute, ordinance or order of a duly constituted public board or officer. Cf. *Hurley* v. *Kincaid*, 285 U. S. 104, note; *Lagunitas Water Co.* v. *Marin County Water Co.*, 163 Cal. 332; *Jones* v. *Lassiter*, 169 N. C. 750; *Red C. Oil Mfg. Co.* v. *Board of Agriculture*, 172 Fed. 695, aff. 222 U. S. 380; *Berdan* v. *Passaic Valley Sewerage Commissioners*, 82 N. J. Eq. 235, aff. 83 N. J. Eq. 340. The public has an interest in the enforcement of all duly enacted law, and the citizens within the area of the Tennessee Valley Authority have a material and pecuniary interest in the enforcement of this particular law. *Railroad Commission* v. *Central of Georgia Ry.*, 170 Fed. 225, 232, 233. Cf. *Cook Brewing Co.* v. *Garber*, 168 Fed. 942, 951. A preliminary injunction in such a case is rightly refused where it would be granted in a suit between private individuals. *Cook Brewing Co.* v. *Garber, supra.* Cf. *New York City* v. *Pine*, 185 U. S. 93, 97; *Southern Counties Gas Co.* v. *City of Long Beach*, 295 Fed. 530, 533; *Water Company of Tonopah* v. *Public Service Commission*, 250 Fed. 304. The delay in carrying out the statute resulting from issuance of a temporary injunction in cases similar to this is an injury to the public interest.[1] Where such a statute is suspended

[1] "The litigation is likely to end sooner if no injunction is in force. Its dispatch is greatly dependent upon the conduct of the case by the complainants. They would not be inclined to press the case for speedy decision when they have once secured a preliminary injunction. As long as it stands, it is as good as any other, and experience shows that it often has practically the effect of a permanent injunction. Knowledge of this fact was probably one of the causes for the enactment of the statute allowing appeals from these interlocutory orders." *Railroad Commission of Alabama* v. *Central of Georgia Ry.*, 170 Fed. 225, 233 (C. C. A. 5).

by preliminary injunction the damage to the public interest cannot readily be appraised, and the public interest cannot be protected by the giving of bond. The equities cannot be balanced, and the *status quo*, so far from being maintained, is destroyed.

MOORMAN, *Circuit Judge*, dissenting in part:

I agree to the setting aside of the injunction, not on the grounds stated in the opinion or concurrence, but for the reason that in my opinion the bill does not state a case for judicial decision. The suit is an attack on the aims and purposes of the Tennessee Valley Authority as expressed in its "power program." Its purpose is to obtain a decree invalidating the program, not as an act or acts done or about to be done, but in its plans and purposes. This tenders an abstract issue only. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, holds that it is not a justiciable question. I find none in the bill. To spell one out from one or another of its allegations of fact would make it defective for joinder of parties having interests too widely variant. I am of opinion, therefore, that the bill should be dismissed, and I dissent from the holding that it should not.